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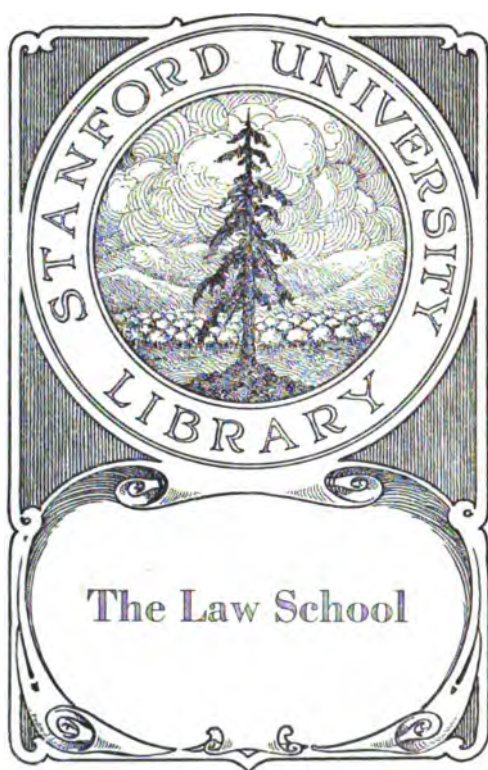
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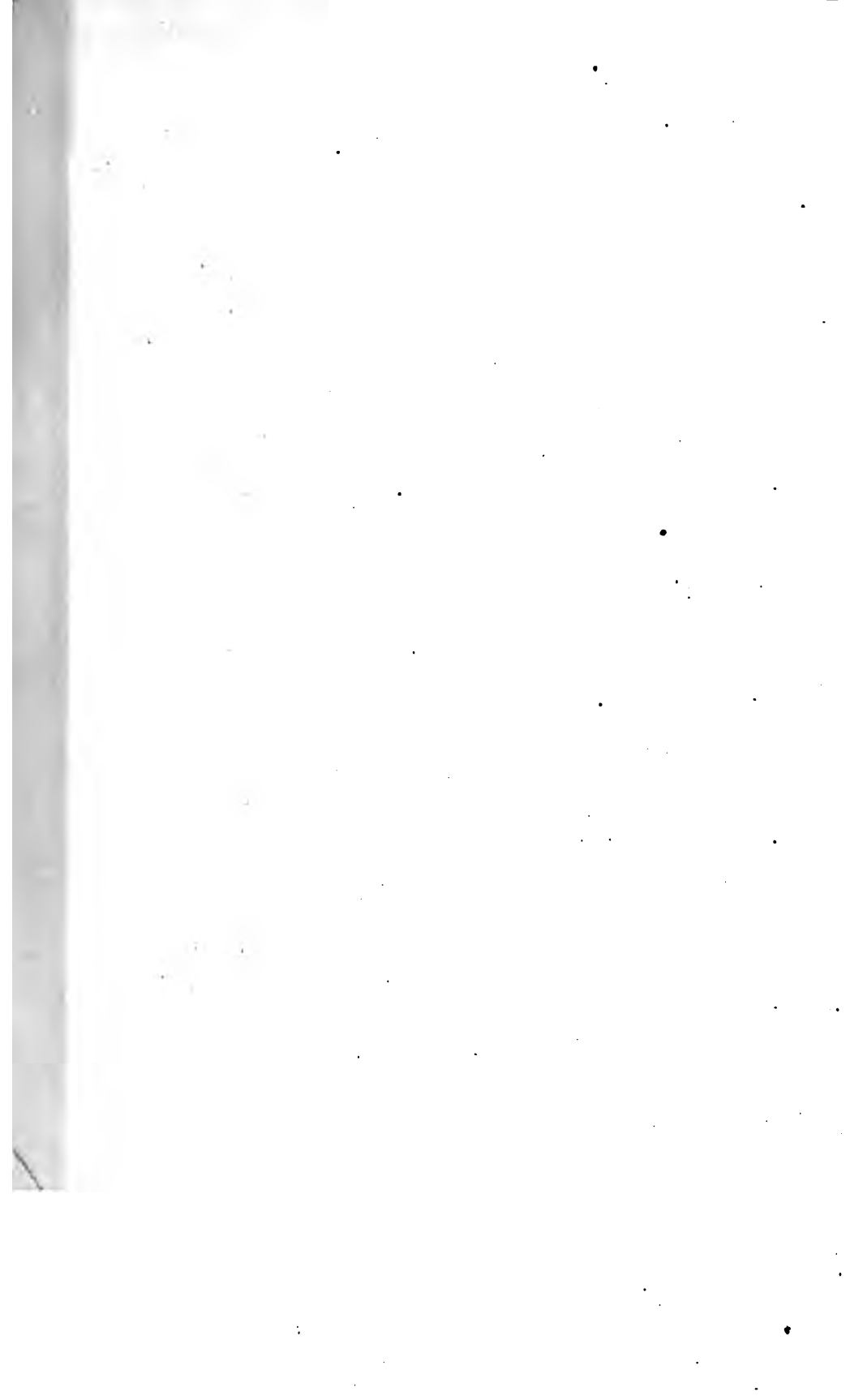
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME V.

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LAW REPORTS,

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NAMES OF THE JUDGES.

OF THE

SEVERAL COURTS IN ENGLAND.

DURING THE TIME OF THE DECISION OF THE CASES REPORTED
IN THE PRESENT VOLUME.¹

QUEEN'S BENCH.

The Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., Ch J.
Sir COLIN BLACKBURN, Knt.
Sir JOHN MELLOR, Knt.
Sir ROBERT LUSH, Knt.
Sir RICHARD QUAIN, Knt.
Sir THOMAS DICKSON ARCHIBALD, Knt.

COMMON PLEAS.

The Right Hon. Sir WILLIAM BOVILL, Knt. Ch. J.²
The Right Hon. Sir JOHN DUKE COLERIDGE.³
Sir HENRY SINGER KEATING, Knt.
Sir WILLIAM BALIOL BRETT, Knt.
Sir ROBERT GROVE, Knt.
Sir GEORGE DENMAN, Knt.
Sir GEORGE ESSEX HONYMAN, Bart.

COURT OF EXCHEQUER.

The Right Hon. Sir FITZ ROY KELLY, Knt., C. B.
Sir SAMUEL MARTIN, Knt.⁴
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
Sir GILLERY PIGOT, Knt.
Sir ANTHONY CLEASBY, Knt.
Sir CHARLES EDWARD POLLOCK, Knt.
Sir RICHARD PAUL AMPHLETT.⁵
Right Hon. Sir Lord SELBOURNE, Lord Chancellor.
Right Hon. Sir WILLIAM MILBOURNE JAMES, } Lord Justices.
Right Hon. Sir GEORGE MELLISH, }

¹ The changes of judges in England have, as a matter of convenience, been brought down to the time of publication instead of ending with the past year. Some of the new judges may not have sat in any of the cases herein reported.

² Lord Chief Justice BOVILL died Nov. 1, 1873. 8 Law Jour., 657; 56 Law Times, 27.

³ Sir JOHN DUKE COLERIDGE was appointed Chief Justice of the Common Pleas, Nov. 19, 1873. 8 Law Jour., 691, 709; 56 Law Times, 15, 27.

⁴ Baron MARTIN resigned January 5, 1874. 56 Law Times, 174; 9 Law Jour., 19.

⁵ RICHARD PAUL AMPHLETT, Q.C., was appointed Baron of the Court of Exchequer, to succeed Baron MARTIN and took his seat January 24, 1874. 9 Law Jour., 47, 54; 56 Law Times, 209.

NAMES OF THE JUDGES.

Hon. Sir RICHARD MALINS,
 Hon. Sir JAMES BACON,
 Hon. Sir CHARLES HALL,²
 Hon. Sir JOHN WICKENS,¹ } Vice Chancellors.

Right Hon. GEORGE JESSEL, Master of the Rolls.
 Hon. Sir JAMES BACON, Chief Judge in Bankruptcy.

HIGH COURT OF ADMIRALTY.

Right Hon. Sir ROBERT JOSEPH PHILLIMORE, Knt., D. C. L.

PROBATE AND DIVORCE.

Right Hon. Sir JAMES HANNEN, Knt.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

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 Lord Chief Justice of the Court of Queen's Bench.
 Lord Chief Justice of the Common Pleas.
 Lord Chief Baron of the Court of Exchequer.
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 Sir MONTAGUE EDWARD SMITH, } Paid Members.
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 Right Hon. Lord JESSEL.
 Right Hon. Lord CAIRNS.
 Right Hon. Lord SELBOURNE.
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 Right Hon. Sir JOSEPH NAPIER.
 Right Hon. Lord Justice JAMES.
 Right Hon. Lord Justice MELLISH.
 Sir BARNES PEACOCK.
 Sir MONTAGUE EDWARD SMITH.
 Sir ROBERT P. COLLIER.

The Prelates of the church of England, who are Privy Counsellors, are members of the Judiciary Committee on Appeals to Her Majesty in Council under the church discipline act, but not otherwise.

¹ Sir JOHN WICKENS died on the 23d day of October, 1873. 56 Law Times, 1, 11; 8 Law Jour., 637.

² CHARLES HALL, Q.C., was appointed vice chancellor, Nov. 6, 1873, to fill the vacancy occasioned by the death of Vice Chancellor WICKENS. 56 Law Times, 15; 8 Law Jour., 638.

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ADDENDA ET CORRIGENDA.

- Page 246, note, The owner of real estate has a right to sever the fixtures and a chattel mortgage properly executed and filed is valid notwithstanding a subsequent mortgage of the real estate. But if the chattel mortgage be paid it seems the mortgagee of the realty would hold the fixtures. *Rose v. Hope*, 22 Upper Canada Common Pleas, 482.
- The rolling stock of a rail road is not fixtures and may be sold for taxes. *Randall v. Elwell*, 52 N. Y. Rep., 521.
- " 502 " As to what is a valid execution and publication of a will. See *Gilbert v. Knox*, 52 N. Y. Rep., 125; *Matter of Kellum's Will*, 52 N. Y. Rep., 517.

A P P E A L C A S E S

BEFORE THE

HOUSE OF LORDS.

[Law Reports, 6 House of Lords Cases, 37.]

July 19, 23, 26, 29, 1872. May 5, 1873.

*JAMES MURRAY, T. H. McCONNEL, and P. R. FALKNER, [37
Appellants; and FRANK WHITTAKER BUSH, Respondent.

*Contributory — Directors — Transfer of Shares — Irregularity — 7 & 8 Vict. c.
110 — Costs.*

A joint stock company was registered under the 7 & 8 Vict. c. 110. Certain clauses in its deed of settlement required that a holder of shares desirous of transferring them must give notice thereof to the officer of the company; that the directors at a board meeting must certify their approval of the proposed transferee; that the transferor must execute a deed of transfer; and that every transferee, approved of by the directors, must, within one calendar month execute, at the office of the company, or at such other place as the board should reasonably require, a deed of covenant to abide by the rules and regulations of the company, "whereupon such person shall become a shareholder of the company." B. held shares in the company, and was a director; he desired to transfer his shares; he gave no notice — no certificate of approval was given before the transfer (it was alleged that such certificate was given after the transfer); a deed of transfer was executed, but no deed of covenant as required by the articles of the association was ever executed:

Held (diss. LORD CHELMSFORD and LORD COLONSAY), that the transfer thus made, though irregularly, was not invalidly made, and the persons then known as directors having at a meeting of shareholders recognized the transferees as shareholders, and having then and there declared them to be elected as directors, and the shareholders at such meeting having accepted them as directors, the validity of the transfer to them and their title to office could not afterwards be impeached:

Per LORD CAIRNS: The clauses in the deed are affirmative clauses — the objection as to the non-execution by the transferee of the deed of covenant is cured by the 30th section of the 7 & 8 Vict. c. 110. The moment the transferee assumed to act as a director, and allowed himself to be returned as a shareholder, he lost all right to question his liability.

Per LORD CHELMSFORD: A transferee of shares may be estopped from disputing his liability as a shareholder, and yet his ownership of the shares may not qualify him for holding office in the company. The 30th section of 7 & 8 Vict. c. 110, does not apply to this case.

Held, also (diss. LORD CHELMSFORD and LORD COLONSAY), that the transfer made under these circumstances was sufficient to relieve the transferor from liability to become a contributory:

The directors had no power to dispense with the execution, by the transferee of the deed of covenant — the only discretion they possessed as to such deed related to the place of its execution.

By one clause of the deed of settlement it was provided that if losses should absorb not only the reserve fund, but only 80 per cent. of the capital *sub- [38

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Murray v. Bush.

scribed for, "the company shall be *ipso facto* dissolved, and the directors shall within twenty days (and they are hereby required so to do) call a special general meeting of the shareholders, and lay a statement of the affairs of the company before such meeting." A report of an accountant specially employed by the directors showed that such losses had occurred. No special meeting was called, nor at the next general meeting (which occurred shortly after the date of the report) was the report laid before the shareholders, but the business of the company was continued. At the general meeting of that year the report was not laid before the shareholders, but they were informed that the increased claims upon the company had so reduced the margin of profit that the directors could not recommend the payment of a dividend. At the next general meeting the shareholders were told that three new directors had been elected, but they were not told that three of the old directors had retired, and that their transferred shares constituted the qualification upon which the new directors had been elected:

Held (diss. LORD CHELMSFORD and LORD COLONSAY), that these circumstances, though entirely irregular, did not invalidate the proceedings of the directors.

Per LORD CAIRNS: The allegations of facts in this case were not those which should have formed the ground for a proceeding to settle contributories; if true they constituted a case for relief of a wholly different description. The case showed the great advantage of the use of some form of pleading.

In the court of the master of the rolls the transfer had been held to be invalid, and the transferor liable to be made a contributory. By Lord Chancellor Hatherley this decision had been reversed. In this house the judgment of the lord chancellor was sustained; but, on account of the differences of opinion, and the irregularities of the proceedings in the transfer (though no fraud was established), no costs were given.

THIS was one of the cases arising out of the winding-up of the Agriculturists' Cattle Insurance Company. That company was, on the 1st of September, 1845, registered under the provisions of the 7 & 8 Vict. c. 110 (¹).

In the month of January, 1854, the respondent Bush became the owner of 100 shares of £5 each in the company; he was shortly afterwards appointed one of the directors of the company, and held that office till he finally transferred his shares. In April, 1856, he (in common with two other persons) advanced to the company a loan of £4000, and a farther sum of £500, the repayment of which was secured by bonds, of which, before July, 1856, Bush became the sole owner. In that month 300 additional shares in the company were allotted to him. As these shares fully paid up were of the nominal value of £1500 that sum was written off the debt of £4500 due to him upon the 39] bonds, which were *then delivered up to be cancelled, and a new bond for £3000 was executed.

In consequence of some pressure upon the company's funds in January, 1858, the directors, of whom Bush was then acting as one, in the month of February, 1858, passed a resolution to "employ Mr. Evans the accountant" to examine the company's books and "prepare a statement" thereon. One of the accounts consisted of a list of debts owing by the company, and included the £3000 due to Bush. Mr. Evans prepared, and on the 19th

(¹) See the history of this company in the cases referred to in p. 41, n.

of March, 1858, laid before the directors, a report and a statement of accounts. His report set forth "that the statement of affairs shows a deficiency or loss to the 31st of December 1857, (including policy risk, estimated at £16,129) of £43,673. The paid up capital amounts to £22,785, and the deficiency therefore, exclusive of capital, is £20,888, or £6068 in excess of the unpaid subscribed capital. On the other hand, you have the value of the business created, with its widely extended connections; and although I can offer no opinion upon the amount at which this should be stated, there can be no doubt that the present organization, which would necessarily cost a large sum, must be valuable either in transfer to another company, or as a basis for farther operations, the groundwork for a more extended and it is to be hoped a more profitable business." The report stated that the books had been kept "upon the principle of double entry carried out with the utmost integrity;" but that in such a business that mode of keeping them afforded no real information of the relation between profits and liabilities. This report was not communicated to the shareholders. The 191st clause of the deed of settlement provided that "if ever the losses of the company shall have absorbed not only the whole of the fund called the reserved fund, but also 80 per cent on the gross amount of the capital subscribed for, the company shall be *ipso facto* dissolved, and the board of directors for the time being shall within twenty days, or as soon after such losses being incurred as the said board possibly can, and they are hereby required to call a special general meeting of the shareholders in such manner as hereinafter mentioned, and lay a statement of the affairs of the company before such meeting." No such meeting was called, or statement laid before the shareholders, but a meeting of the directors was held, at which the chairman and Messrs. Fitzpatrick and Bush were appointed to examine the *balance sheet of the company. The secretary [40 assented to a reduction of £300 from his annual salary, reducing it from £800 to £500 a year, and the attendance fee of a director was reduced from three guineas to one guinea. In April, 1858, Bush transferred to one Hughes the bond debt, making Hughes a trustee thereof for his, Bush's benefit. An account of the receipts and expenditure was in April, 1858, laid before the directors; but it had been prepared by Bush and Fitzpatrick in the unsatisfactory way declared by Mr. Evans the accountant to be unsatisfactory, as not showing the real position of the company carrying on this peculiar business. In that year the directors stated that, as the increased claims on the company had reduced the margin of profits, they did not recommend the payment of any dividend. Shortly afterwards Hughes, the

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trustee of Bush's bond, applied to the directors to give him a promissory note for the £3000 and interest, and a promissory note at twelve months' date was accordingly given him.

There was a general annual meeting held on the 9th of April, 1859, but no allusion was made thereat to any sale or intended sale of shares by any of the directors.

On the same 9th of April, 1859, Bush transferred all his shares in the company to one Morrison, who was then announced to the meeting as a director; but there was no formal declaration of Bush's retirement from the direction, and he sat as a director at a meeting on the 11th of that month of April. Two other persons were also announced as new directors, but nothing was said as to the transfer of the shares which constituted their qualification, nor as to the old directors having dispensed with the rule which required a proprietor to have held his shares for a certain specified time before he became eligible to be made a director.

A notice of an intention to transfer shares is required by the 177th clause of the deed of settlement. There was no entry showing such notice to have been given by Bush, nor was there any certificate of approval by the directors of such transfer produced. Bush, however, alleged that such approval had been duly given, but that he had lost it. Morrison (and two other persons transferees of other shares) had never executed the deed of settlement, nor had these persons become qualified according to the provisions of that deed to be directors. On the 11th of April, 1859, notice of the transfer of Bush's shares to Morrison [41] was sent *to the registrar of joint stock companies, and was signed by Bush himself in his character of a director of the company; but the irregularity of this notice being discovered, another notice to the same effect, signed by other directors, was sent in. Morrison had since become bankrupt and died. On the 29th of October, 1859, Hughes brought an action against the company on the promissory note for £3000, and signed judgment thereon upon the 17th of April, 1861.

On the 20th of April, 1861, a winding-up order was made. The appellants were the executors of Thomas Houldsworth, deceased, and by order of this house, dated the 26th of June, 1868, had been put upon the list of contributories (¹). They alleged that they had since, but not earlier than November, 1869, discovered the circumstances of the transfers by Bush, and the irregular manner in which those transfers had been made, which made them insist that Bush should also be put

(¹) *Houldsworth v. Evans*, Law Rep., 1d., 249; and this case in the court 3 H. L., 263; see also *Spackman v. Evans*, Id., 171; *Evans v. Smallcombe*, below, Law Rep., 6 Ch. Ap., 246.

upon the list of contributories. In February, 1870, they took out a summons for that purpose. This summons was heard before the master of the rolls on the 27th of May, 1870, when his lordship made the order prayed for. On appeal to Lord Chancellor Hatherley this order was, on the 19th of December, 1870, discharged ⁽¹⁾.

This appeal was then brought.

The *Solicitor-General* (Sir G. Jessel), and Mr. *Lindley*, Q.C. (Mr. *Westlake* was with them), for the appellants: The directors, of whom Bush was one, after receiving Mr. Evans's report, were bound to communicate it to the shareholders. Instead of doing so they concealed it, and so misled the shareholders as to the real condition of the company, and prolonged its existence when it was clear that it had fallen into difficulties of the most serious kind. This was not only a breach of general duty on the part of the directors, but it was a direct violation of the express provisions of article 191 of the deed of settlement, and affected *the very foundation of all the subsequent acts of the di- [42] rectors. The subsequent transfers of Bush's shares could only be accounted for by his desire to escape from an insolvent concern, and the mode in which these transfers were effected was so irregular as to make the transfers absolutely invalid. The transfers were made without the notices required, without the approval given, without the proper forms being observed by the incoming shareholders, the transferees, who had not held their shares a sufficient time to be eligible as directors, and never executed the deed of settlement, and were never therefore legally shareholders, and the whole of the arrangement was concealed from the knowledge of the shareholders, who at the general meeting were told that new directors had been elected, but were informed of nothing else, though in fact those new directors had only been elected (and irregularly elected) in the place of those who, having parted with all their shares, had become incapacitated to remain as directors. All these things were concealed from the shareholders in order to enable Bush to dispose of his shares, and escape from the liability which attached to him. Now it was particularly the duty of Bush as a director to see that the articles of the association were duly observed: he knew them; it was impossible that he could plead ignorance of them; it was his duty to enforce them, yet in his case all of them had been disregarded. The result was, that as these shares had not been transferred *bond fide*, but, as all the

(1) *Law Rep.*, 6 Ch. Ap., 246, where the facts are set forth in detail, and extracts are given from the articles in the deed of settlement. As the facts of this case are minutely referred to in the

judgments of the noble and learned lords, it was deemed inexpedient to give more than a mere sketch of them in the opening statement.

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trustee of Bush's bond, applied to the directors to give him a promissory note for the £3000 and interest, and a promissory note at twelve months' date was accordingly given him.

There was a general annual meeting held on the 9th of April, 1859, but no allusion was made thereat to any sale or intended sale of shares by any of the directors.

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circumstances showed, in pursuance of a scheme to relieve Bush from liability, and in utter violation of the terms of the articles of association, the transfers must be held to be bad, the transferees had never lawfully become members of the company, and Bush must be placed on the list of contributories. *Ex parte Brown* ⁽¹⁾; 17 & 18 Vict. c. 110, s. 27: *Wilkinson v. The Anglo-Californian Gold Mining Company* ⁽²⁾; *The Galvanized Iron Company v. Westoby* ⁽³⁾; and *Hay v. Willoughby* ⁽⁴⁾ were referred to.

Mr. Amphlett, Q.C., and Mr. Roxburgh, Q.C. (Mr. George Curtis Price was with them), for the respondent: There is no pretense for suggesting fraud or the working of a scheme in 43] this case. The respondent advanced his money to the association, and held his shares in it, in the full belief that it would be prosperous. He had been offered a sum in cash for his shares, and had refused the offer ⁽⁵⁾, though his acceptance of it at the moment it was made would have given him a considerable sum in ready money, and would have relieved him from all liability, and from the possibility of such imputations as have since been sought to be made against him. If the requirements of the articles of association were not complied with to the letter, they were complied with according to the practice which had been followed in the association as to all shares and transfers of shares during its existence. There never had been an exact observance of the directions in the deed of settlement as to the transfer of shares. There was no doubt as to the *bonâ fides* of the transaction. The master of the rolls had declared that, but he thought that the irregularities in the mode of making the transfers had affected the validity of those transfers. That was a mistake. What were the irregularities? They were not such as to affect the validity of the transfers, which had all been recognized not only by the directors, but by the shareholders themselves, who at public meetings of the company had accepted the transferees as directors; and, at all events, if they did not execute the deed of settlement they executed the deed of transfer which fixed them with liability as shareholders, and they were duly returned as such to the office of the registrar of joint stock companies. *Jessop's Case* ⁽⁶⁾, *Straffon's Executor's Case* ⁽⁷⁾, *Howard v. Wheatley* ⁽⁸⁾, *Burnes v. Pennell* ⁽⁹⁾, *Bargate v. Shortridge* ⁽¹⁰⁾, *Turquand v. Marshall* ⁽¹¹⁾, *Jessop's Case* ⁽¹²⁾, and *Morris v. Cannon* ⁽¹³⁾, were cited.

⁽¹⁾ 19 Beav., 97.

⁽²⁾ 18 Q. B., 728.

⁽³⁾ 8 Ex., 17.

⁽⁴⁾ 10 Hare, 242; 22 L. J. (Ch.), 249.

⁽⁵⁾ This matter is fully referred to in the judgment.

⁽⁶⁾ 2 De G. & J., 688.

⁽⁷⁾ 1 De G. M. & G., 576.

⁽⁸⁾ 3 De G. M. & G., 628.

⁽⁹⁾ 2 H. L. C., 497.

⁽¹⁰⁾ 5 H. L. C., 297.

⁽¹¹⁾ Law Rep. 4Ch. Ap., 376.

⁽¹²⁾ 2 De G. & J., 638; 27 L. J. (Ch.), 757

⁽¹³⁾ 4 De G. & J., 581.

LORD CHELMSFORD: My lords, the question raised by this appeal is whether the respondent Bush is liable to be placed upon the list of contributories in respect of shares which he held in the Agriculturists' Cattle Insurance Company, after the sale and execution of a deed of transfer of them to the purchaser Mr. Peter Morrison.

*The appellants contest the validity of the transfer on the [44 ground of substantial departures from the requirements of the deed of settlement upon the transfer of shares, and of Morrison's omission to do all that was necessary to be done in order to discharge the respondent from his liabilities in respect of the shares.

The deed of transfer was executed on the 9th April, 1859, and was expressed to be made in consideration of £2000, payable on certain events, which were afterwards stated by agreement to be, that the £2000 were not to be paid till the 11th of April, 1863, unless the company paid a dividend of 5 per cent before the 11th of April, 1861, and that in the event of the company being wound up before the 11th of April, 1863, (which happened,) nothing was to be paid.

Some remarks were made upon this agreement in impeachment of the *bonâ fides* of Mr. Bush; but it must be observed that he refused an offer from Morrison of £1 10s. a share to be paid immediately, and was content to accept terms which involved the risk of losing the whole of the price of his shares. On the other hand the nature of the agreement indicates an opinion that the company was not unlikely to fall into difficulties, which from the facts in the knowledge of Mr. Bush he might reasonably have been led to anticipate. These facts, so known to Mr. Bush and also to the other directors of the company, but which were not communicated to the shareholders, appear to me to have an important bearing on the question of the validity of the transfer of the shares in question.

In the year 1858 the company was not in a satisfactory state, and Mr. Evans, an accountant, was employed to investigate its affairs. It was said that the duty required of him must have been a very slight one, as he was to receive only £10 for his services. But there can be no doubt that he was to ascertain and to inform the directors what was the actual state of the company; and the statement of accounts which accompanied the report made by him could not have occupied much of the time of an experienced accountant.

The report itself disclosed to the directors this unsatisfactory condition of affairs, that the losses sustained by the company had absorbed 80 per cent on the gross amount of the capital subscribed for. Now by the 191st clause of the deed of settlement it is *provided that if ever losses to this extent shall [45

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occur "the company shall be *ipso facto* dissolved, and the board of directors shall, within 20 days (and they are thereby required so to do) call a special general meeting of the shareholders and lay a statement of the affairs of the company before such meeting." I agree with the remark made in the course of the argument that it is difficult to understand the meaning of the words "*ipso facto* dissolved." But it is clear that by this clause the directors were required, and it was their duty, to call a special meeting of the shareholders, and lay the statement of the affairs of the company, which they had procured for their own information, before such meeting. No such meeting was called, but as the annual general meeting was near at hand this might have been considered unnecessary. But whether at a meeting specially called, or at the annual general meeting, it was the bounden duty of the directors to bring Mr. Evans's report to the knowledge of the shareholders.

It was argued that 80 per cent of the capital had not been absorbed by the losses, because the goodwill of the company had not been taken into account by Mr. Evans, although he states in his report, as against the losses, the value of the business created with its widely extended connections, which (he says) "must be valuable either in transfer to another company, or as a basis for farther operations." I do not stop to inquire whether the directors had or had not a right to calculate the value of the goodwill for the purpose of showing that the capital had not been absorbed to the extent of 80 per cent. But assuming that the goodwill is to be taken into account, and that it has the effect of reducing the percentage of absorption of the capital below 80 per cent, I cannot understand how this can afford the smallest excuse for the directors having withheld Mr. Evans's report from the general meeting. For what were they bound to do under the deed of settlement? By the 105th clause they were to make up to the 31st of December in every year a fair, accurate, full, and explicit statement, account, and balance sheet, showing clearly and justly the debts, credits, and liabilities, and the profits, gains, and losses which had been made or incurred by the company. And by the 165th clause they were to produce at every annual meeting a report of the receipts and disbursements for the year preceding, and of the particulars [46] and amount of the funds or property of the company, and of the state or condition thereof. Can it be said that the directors had performed their duty when they withheld from the shareholders a report which they had obtained expressly for the purpose of ascertaining the state and condition of the company?

In judging of the conduct of the directors towards the shareholders, I am compelled to express my opinion that they not

only kept back information which they were bound to furnish, but that they made a representation which was calculated to mislead them as to the true state of the company. With the knowledge that losses had been sustained which rendered it improper for them to declare a dividend, it was not fair to tell the shareholders that the increased claims upon the company had so reduced the margin of profit arising from the company's operations that they could not recommend the payment of any dividend for the past year. What could the shareholders conclude from this statement but that the result of the company's operations for the past year had been not a loss but a profit, though a profit not sufficiently large to enable them to declare a dividend? It must be admitted that the accounts which were furnished by Mr. Evans, and laid before the meeting, afforded the shareholders no opportunity of forming a judgment upon the actual condition of the company, even if it had been possible at their general meeting to investigate these accounts, for Mr. Evans, in his report to the directors, tells them "that the statement of receipts and expenditure is not a correct account of profit and loss, nor does it show the position of the company, and that it is therefore practically useless."

The shareholders were thus kept by the directors in ignorance of the affairs of the company, and this ignorance continued down to the time of the next annual general meeting on the 9th of April, 1859; to which period the question as to the validity of Mr. Bush's transfer of his shares more immediately refers. In the intervening time events had occurred which must be noticed as bearing upon this period. Before this next general meeting all the seven persons who were directors at the time of the former meeting in 1858, had ceased to be directors, either by actual resignation, or by disqualifying themselves by the transfer of their shares. The vacancies occasioned by the retirement of four of them had not been filled up, and at the time of the meeting in 1859 the *only acting directors were Mr. [47 Bush, Dr. Johnson, and General Hope.

In this year negotiations had been set on foot for a "working connection" (the nature of which was not explained) between the company and the Bank of Deposit, of which Lord Keane, Mr. Morrison, and Major Adair were directors. An arrangement seems to have been made by which these three gentlemen were to become directors of the company and were to have shares transferred to them to qualify them to hold the office of director. Accordingly, on the 8th of April, 1859, a meeting of directors took place, at which were present the three remaining directors already mentioned, Mr. Bush, Dr. Johnson, and General Hope. At this meeting the directors approved of the

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transfer of 200 shares from General Hope to Mr. Morrison, of 100 shares from Major Bere to Mr. Morrison, and of 100 shares from Major Bere to Lord Keane, and they ordered that Lord Keane, Major Adair, Mr. Morrison, and Major Bere should be declared directors of the company, and that in favor of the first three of these gentlemen the qualification for the office of director, arising from having been the holder of shares for three calendar months, should be dispensed with. The three directors must at this time have all agreed to transfer the whole of their shares, because a transfer by each of them was executed on the following day. No reason is given why the transfer of his shares by General Hope should alone have been approved of, and why the transfers by Dr. Johnson and Mr. Bush were not noticed. It may be observed that the transfer by Mr. Bush to Mr. Morrison was not necessary to qualify him to become a director, as more than the number of shares to constitute a qualification had been transferred to him by General Hope and Major Bere. In his examination before the master of the rolls Mr. Bush said, "I believe the share capital would not have met its engagements, but the members of the company were rich men who would have met every engagement of the company." It is not clear as to the time to which he is referring; but when he transferred his shares he knew that there would not be one of the former directors remaining in the company, and his observation is inapplicable in terms to the new directors who were appointed the day before the execution of his deed of transfer. 48] As to these *gentlemen, though they might have been in good credit at the time (of which we know nothing) they have since been all of them unable to meet the engagements of the company. It must also be observed that the transfer of General Hope's and Dr. Johnson's shares were for nominal considerations, and that Mr. Bush's transfer was made upon an agreement which (as already noticed) indicates his opinion of the precarious fortunes of the company.

In this state of things it cannot be denied that the shareholders were entitled to have the fact of the changes which had taken place and which were about to take place in the management of the affairs of the company fully and fairly disclosed to them. I am compelled to express my opinion that not only was this disclosure not made, but that the report to the shareholders was calculated (if not intended) to hide the truth from them. It certainly would have startled the shareholders to learn that since the last general meeting the seven directors had been reduced to three, and that those three had transferred or were about to transfer that very day all their shares, and so deprive themselves of their qualification. What must be thought

of the statement in the report that General Hope and Dr. Johnson were the directors who retired by rotation, when it was known to those whose report it was (and Mr. Bush was one of them) that they could no longer be directors, the re-election by the meeting having proceeded upon the erroneous representation of their position in the company. The shareholders could only understand from the statement that with the four newly elected directors the continuance in the direction of Mr. Bush, General Hope, and Dr. Johnson would make up the same number of seven directors as existed at the time of the annual general meeting in 1858. The re-elected directors never could, by the law of the company, act for a single day. On the 15th of April when a certificate of the approval of the transfer of Mr. Bush's shares is proved to have been given, the newly elected directors alone were present. Although this approval does not appear upon the minutes, yet that a certificate of such approval was signed by the directors on the 15th of April is proved by Mr. Goold, the former secretary to the company, who was present on that day. The fact that the approval was given after the transfer, instead of before, as prescribed by the deed of settlement though mentioned *in the course of the [49 argument, was very properly not insisted upon. But the validity of the transfer of Mr. Bush's shares was impeached on the ground that the persons who approved of the transfer were disqualified from acting as directors, and consequently that their approval was nugatory.

The approval of a transfer of shares by clause 177A of the deed of settlement is to be certified by the board of directors, and by the 59th clause no business is to be transacted by the board unless three directors are present. The objection taken to the qualification of three out of the four directors present on the 15th of April, viz. Lord Keane, Major Adair, and Mr. Morrison, is that they were not qualified to be appointed directors, not being at the time of their appointment shareholders of the company. By clauses 177, 177A, and 178 of the deed of settlement the following course must be pursued upon a transfer of shares. A holder of shares who has procured another person to become a shareholder in respect of his shares must give notice of the proposed transfer at the office of the company; the board of directors must certify their approbation of the proposed shareholder; the transferor must execute a deed or instrument of transfer; and by clause 185 every person approved by the board of directors, and to whom a transfer of the shares has been made, must within one calendar month after such transfer execute at the office of the company, or at such other place as the board shall reasonably require, a deed of covenant to abide

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by the rules and regulations of the company, "whereupon such person shall become a shareholder of the company." It may be worthy of remark, that the requisitions of this clause, when complied with, bring a transferee precisely within the definition of a shareholder given by the 7 & 8 Vict. c. 110 (under which act the company was formed and registered) viz., "A person entitled to a share in a company and who has executed the deed of settlement or a deed referring to it." None of the three nominated directors executed any such deed, and the question is, whether without having done so any one of them had become a shareholder.

It was argued that the execution of a deed by a transferee of shares is not absolutely necessary to make him a shareholder, because it is at the pleasure of the directors whether they will require a deed or not. But this argument is incorrect. The 50] *directors have no power to dispense with the deed. The 185th clause is imperative as to the execution of the deed of covenant, although the place where it is to be executed is in the discretion of the directors. The words of the clause are, "shall execute at the office of the company, or at such other place as the board shall reasonably require," the latter words being capable of reference only to the words "at such other place."

It was farther argued that the deeds of transfer executed by General Hope and Mr. Morrison, and by Dr. Johnson and Lord Keane satisfied the requisitions of the 185th clause, as they referred to the deed of settlement by the transferees agreeing to hold the shares subject to the conditions on which they were held by the transferors. This argument is disposed of at once by merely reading the clause, which expressly makes a distinction between the deed of transfer and the deed of covenant, by requiring that every person to whom a transfer has been made (that is by deed or instrument of transfer previously mentioned) shall within one month after such transfer execute a deed of covenant.

An argument in favor of the legality of the appointment of the approving directors was drawn from the time given for the transferee to execute the deed. The transfers of the shares in question were approved of on the same day that the transferees were appointed directors; and it was said, that as they might have executed the deed within the month they were qualified instantaneously, but subject to their future disqualification upon their non-execution of the deed within the time prescribed. But this argument is good for nothing unless it can go the length of saying that under the 185th clause the transferee becomes a shareholder immediately upon the transfer and before the execution of the deed; thereby utterly rejecting the words at the end of

the clause "whereupon" (that is upon the execution of the deed of covenant) "such person shall become a shareholder."

It was farther contended that the transferees of the shares of General Hope and Dr. Johnson were precluded by their acceptance of the transfers from denying that they had become shareholders, and, therefore, that they were practically qualified to be directors. There can be no doubt that after an informal transfer of shares neither the transferor can repudiate the transaction, nor can the *transferee, in most cases, dispute his [51] liability. But a transferee may be estopped from disputing his liability as a shareholder, and yet his ownership of the shares may not qualify him for holding an office in the company, where the deed of settlement expressly requires that the transfer upon which his qualification depends shall only be made in a certain form, which has not been pursued.

The cases of *Bargate v. Shortridge* ⁽¹⁾ and *Morris v. Cunnan* ⁽²⁾, which were cited in support of the argument that General Hope and Dr. Johnson were qualified as directors because they could not dispute their liability as shareholders, are very far from establishing the proposition. In *Bargate v. Shortridge* ⁽¹⁾ the directors of a company who had given a consent to a transfer of shares in an irregular manner, but one which had always been adopted since the formation of the company, were not allowed, so far as they themselves were concerned, to dispute the transfer of the shares, and the consequent discharge of the transferor's liability, upon the ground of such irregularity. And in *Morris v. Cunnan* ⁽²⁾ the assignees of a bankrupt attempted in vain to invalidate a transfer of the shares made by the bankrupt because he had not executed the company's deed of settlement. In each of these cases the party guilty of the irregularity or the default (for the assignees of the bankrupt stood in his shoes) endeavored, but in vain, to take advantage of their own failure to comply with the requisites for the completion of the transfer in order to avoid it.

That transferees who have not executed the deed of covenant are not completely shareholders has been decided in two or three cases. In *Wilkinson v. The Anglo Californian Gold Mining Company* ⁽³⁾ the court held that a person who had subscribed for shares in a joint stock company, completely registered under the statute 7 & 8 Vict. c. 110, was not entitled to a certificate of the proprietorship of such shares as a shareholder under sect. 51 of the act till he had executed the deed of settlement, or a deed referring thereto. *Moss v. The Steam Gondola Company* ⁽⁴⁾ decided, that to entitle a creditor who has obtained judgment

⁽¹⁾ 5 H. L. C., 297.

⁽²⁾ 4 De G. F. & J., 581.

⁽³⁾ 18 Q. B., 728.

⁽⁴⁾ 18 C. B., 180.

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against a joint stock company, completely registered under the 7 & 8 Vict. c. 110, to an execution against one as a shareholder 52] under 8 & 9 *Vict c. 16, s. 36, it must be shown that the party against whom the application is made comes within the statutory description of a shareholder, viz., "one who has signed the deed of settlement," and that it is not sufficient to show that he has acted as a director of the company. And in *The Galvanized Iron Company v. Westoby* ⁽¹⁾ the defendant had obtained an allotment of shares in the company, had paid a deposit, and his name was inserted in the register of shareholders, but he never executed the deed of settlement. An act of parliament passed for winding up the affairs of the company which empowered the directors to sue for calls, enacted that in such actions "the register should be *prima facie* evidence of the defendant being a shareholder, provided that such calls should be made according to the provisions of the deed of settlement, and as regarded the liability of shareholders should be deemed to have been made under such provisions"; and it was provided that "nothing in the act contained, except as therein expressly enacted, should render liable to any calls any shareholder or other person who would not have been liable thereto if that act had not passed." The defendant having been sued for calls the Court of Exchequer held that the private act applied to shareholders only, and that the defendant was not liable as a shareholder, inasmuch as he had never executed any deed of settlement. These cases satisfy me that although Lord Keane, Major Adair, and Mr. Morrison were on the 8th of April what may be called incipient shareholders, they were not such shareholders as were qualified on that day to be appointed directors of the company.

Reliance in favor of the validity of their appointment is placed upon the fact that in very few instances the transferees of shares executed any deed. It is proved, that from the formation of the company to the date of the winding-up order there were eighty transfers of shares in the company, of which fifty-three were to forty-one persons not previously shareholders, and of these forty-one persons, thirty-eight did not execute any deed. It was contended that this almost universal practice sanctioned the irregularity which had occurred in the appointment of the directors in question. But sanctioned by whom? By the directors, who were bound to take care in every instance that the transferee had done what was necessary to make him subject to all the liabilities of a shareholder. The directors who had approved of the transfer of the shares could not, according to the case of *Bargate v. Shortridge* ⁽²⁾, in a question between them and the transferee, deny that he was a shareholder; nor

(1) 8 Ex., 17.

(2) 5 H. L. C., 297.

in a contest between the transferor and transferee, could they deny, the one that he had truly transferred his shares, and the other that he had become the proprietor of the shares in his stead. But where it is the interest of the other shareholders to dispute the validity of the transfer, and to insist upon the continuance of the liability of the transferor, I do not see how any former irregularities, however constant, over which they had no control, and of which they probably were not cognizant, could preclude them from the objection.

But the respondent says that, assuming the directors were not qualified, yet having been directors *de facto*, their acts are valid by the 30th section of the 7 & 8 Vict. c. 110. But that section applies merely to the case of a person having acted as a director, and to it being afterwards discovered that he was disqualified, and it makes all acts done by him before such discovery as binding as if such person had been duly appointed or qualified. But what after discovery has there been in this case? The directors who declared Lord Keane, Major Adair, and Mr. Morrison, to be directors of the company knew perfectly well that they had not the qualification required by the deed of settlement, and therefore that their acts would be void. The 30th section of the act is therefore totally inapplicable to this case.

Supposing, however, all the objections with regard to the approval of the transfer of Mr. Bush's shares to be got over, the 190th clause of the deed of settlement does not discharge him from his liabilities until his transferee has executed a deed of covenant. It was argued that this deed being the act of the transferee, the transferor has no means of compelling its execution, or even knowing that it has not been executed. But surely it was his duty, as well as his interest, to inquire whether his proposed transferee had performed what was necessary in order to complete the transfer; and if he omitted to do so he must suffer the penalty of *his own neglect. Mr. Bush, [54 as a director of the company, must have fully known what was required by the deed of settlement to render valid a transfer of his shares; and therefore he is inexcusable for not having ascertained whether the transferee had complied with these requisites, and if he found that he had not, for not enforcing his compliance with them. Whatever, therefore, may be the correct conclusion upon the former points which have been urged in this case, the purchaser of Mr. Bush's shares not having executed a deed of covenant to observe the covenants, agreements, and provisions contained in the deed of settlement, the condition precedent upon which Mr. Bush's discharge from his liability in respect of his shares depends has not been performed, and he therefore ought to be placed on the list of contributories.

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I think that the order of the lord chancellor should be reversed; but I believe that two of my noble and learned friends are of a different opinion, and, therefore, the result will be that it will stand unreversed.

LORD COLONSAY: My lords, I have very little to say upon this case, on which I have arrived at the same conclusion as my noble and learned friend who has just spoken, nor am I to-day in a condition of health to be able to say much.

The question is, whether, between the 9th of April, 1859 and the winding-up, Mr. Bush was divested of his position as a shareholder in the company. It appears that the proceedings of this company were not conducted with the greatest regularity — their books even were not kept with the greatest regularity, and there were many inaccuracies with regard to their proceedings. Mr. Bush, who was a director of the company for a considerable time, as well as a shareholder, may have been in some degree responsible for not seeing that these matters were more carefully looked after; but with regard to the line of argument adopted at the bar upon this appeal, I feel it a duty incumbent upon me to say that I do not think that any case was made out against Mr. Bush personally, of the character that was attempted to be made out against him. I do not think that there was any successful attempt made to impeach his *bond fides*, and that makes me feel the greater regret *that there were inaccuracies which, in my opinion, prevent his obtaining the relief which he seeks. I think the inaccuracies were just those which have been pointed out by my noble and learned friend, and I shall only indicate them as being the basis of what I offer as my opinion.

It appears that on the 9th of April, 1859, Mr. Bush transferred all his shares to Mr. Morrison for £2000, to be paid in the month of April, 1861, contingently. The agreement for the sale of his shares is a very peculiar one, but it does not lead me to retract in any degree what I have said. Then, on the 11th of April, 1859, there was a return of the transfer to the registrar of joint stock companies. Now the objections are these. In the first place, the transfer was not approved of by competent directors because the persons appointed on the 8th of April were not then shareholders, and therefore were not in a position to be directors of the company. I agree with my noble and learned friend who has just spoken, as to the effect of those elections. I think those persons were not properly shareholders, and therefore they were not capable of giving a valid confirmation to and approval of the transfer. The second objection is that the transferee, Mr. Morrison, had never signed the deed. That also, in my opinion, forms a valid ground of objection.

These, my lords, are the two grounds upon which I think that Mr. Bush could not get himself effectually relieved. I wish it had been otherwise.

LORD CAIRNS : My lords, it appears that in the winding up of this company the name of Peter Morrison was, in the first instance, placed upon the list of contributories as proprietor of the 400 shares which have been mentioned by my noble and learned friend. A summons was subsequently taken out by the executors of Mr. Houldsworth, who, as representing their testator, had been placed upon the list of contributories, and that summons required the respondent, Mr. Bush, to show cause why his name should not be settled upon the list of contributories in respect of these 400 shares, and the name of Peter Morrison removed.

That, my lords, is the foundation of the proceedings which now come before your lordships ; and I own, I never have seen a case *which more strongly, to my mind, proved the great [56 advantage of some form of allegation and of pleading in a litigation between adverse parties. Your lordships have now before you a thick volume, containing several hundred pages, and you are left to discover from that volume, and from the arguments of counsel at your lordships' bar, from a mass of affidavits, from some parol testimony, and from a number of documents, what the case is which is alleged, what the ground is why this list of contributories should be altered by one name which has been placed upon it being taken off, and another substituted. And I may say in passing, as if the matter were not difficult enough in itself, the difficulty and confusion in this case have been increased, and, I am sorry to say, the expense increased also, by the circumstance that the appellants have printed at length a very voluminous appendix, and the respondent has printed at length the same appendix, and the respondent has even gone beyond that, for he has added a shorthand writer's note of the argument of counsel in the court below, and, farther, a somewhat long and argumentative affidavit, filed entirely irregularly, to prove whose fault it was that there was a double appendix in place of a single one. My lords, anything more irregular or burdensome as regards costs and the consumption of time than this case is, starting at first with what I have referred to, namely, the absence of any pleading or allegation, and that difficulty added to by the lavish mode in which the parties have proceeded with regard to expense, I have never seen.

Well, my lords, we have, as I have said, to discover from this mass of documents, aided by the argument of counsel at your lordships' bar, which I remember was extremely able, what is the case which is alleged as the foundation of these proceedings ?

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It is said that the transfer of the 400 shares in question from Mr. Bush to Mr. Morrison was invalid by reason of informality. I shall reserve for the last of the observations I have to make that ground of attack on the transfer. The second reason alleged is this: the 191st clause of the deed of settlement of this company provided: "That if ever the losses of the company shall have absorbed not only the whole of the fund called the reserve fund, but also 80 per cent on the gross amount of the capital subscribed for, the said company shall be *ipso facto* [57] dissolved, and the board of directors for *the time being shall within twenty days, or as soon after such losses being incurred as the said board possibly can, and they are hereby required to call a special general meeting of the shareholders in such manner as hereinbefore mentioned, and lay a statement of the affairs of the company before such meeting." It is said that before the month of April, 1858, when Mr. Evans made his report, this contingency contemplated by the 191st clause had occurred, that more than 80 per cent of the capital had been lost, and, that, therefore, the clause had become operative. My lords, if the clause become operative, that which had taken place was the *ipso facto* dissolution of the company, and if the company was *ipso facto* dissolved I may say that the consequence would have been, not that a question would have arisen as to the transfer of shares as between Bush and Morrison, but the consequence would have been that all transfers afterwards made would have been invalid, and the shares of all persons would have become incapable of transfer, and the company would have become incapable of undertaking any new business or entering into any new contract, whereas, in point of fact, we know that it carried on business for some years subsequently, and that transfers of many other shares were made. If the clause therefore had become applicable, if the contingency mentioned in it had occurred, it would have been a ground not for removing the name of Morrison and substituting the name of Bush upon this register, but it would have been a ground for a proceeding of a wholly different kind, a proceeding challenging everything as absolutely inept and invalid which had been done by the company from the time that the *ipso facto* dissolution had taken place.

But I am bound farther to say that it appears to me that the proof that the contingency contemplated by the 191st section had occurred, has entirely failed. I have looked at the report of Mr. Evans, and it appears to me that this observation is to be made upon that report; which, indeed, Mr. Evans himself made in the document which accompanied it — he has taken an account of the capital of the company, and of the debts and the

liabilities, but he has not, as he himself states, made any allowance for the value of the goodwill of the company as a going concern. The company was an extremely peculiar one. Of the insurances and risks we *are only now told the par- [58
ticulars. There was coming in year after year a body of premiums varying from £30,000 to £40,000, a connection, a goodwill, a public favor had been created by the company, rightly or wrongly, by means of its business as conducted up to that time, and by means of the advertisements to which it had resorted; and whether that goodwill should be estimated as it is stated to have been estimated by a valuator, as of the value of three years of these annual premiums, or at a smaller or at a larger sum, I need not stop to inquire. It is abundantly evident that the goodwill of the concern as a going concern was worth some substantial sum, and that sum is altogether omitted, as indeed Mr. Evans states, from his calculations. Whether if a proper sum had been allowed in respect of goodwill it would have shown that the capital had been reduced anything like 80 per cent your lordships cannot, I think, speculate. It is sufficient to say that there is no proof upon the subject, and therefore those upon whom the onus of proof lay to show that the contingency mentioned in the 191st section had occurred, have entirely failed, as it seems to me, to sustain that onus.

Then, my lords, I pass to the next head of challenge of the transfer of these shares, which, in point of fact, occupied the greatest portion of the argument at your lordships' bar. I am obliged to look at the case of the appellants for a statement of what this head of challenge is to be taken to mean, and I find at the commencement of the case, on the first page, "the appellants contend that the transfer was informal and invalid, and was part of a scheme by which the respondent Bush and the only other two directors of the company were enabled to leave the company without exciting the suspicion of the shareholders, and without informing them of what the directors knew to be the fact, namely, that the company's capital was insufficient to meet its engagements, and that the company was in such a position that, according to the provisions of its deed of settlement, it ought to be wound up." And farther on, at page 15 of the case, there commences a narrative of the proceedings of the directors from the month of April, 1858, when Mr. Evans's report was made. It states the resignation of Mr. Fitzpatrick, who was the first of the directors who resigned, and transferred his shares in the month *of April, 1858—it states the re- [59
signation and transfer of the shares of Mr. Smith and of Mr. Tyler, and then it continues: "In this way three out of the seven persons who were directors at the time Evans's report

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was made quietly got rid of their shares, and Hope, Johnson, Western, and Bush were left the only directors of the company." And the first of the reasons for the appeal is stated thus: "Because it was the duty of the respondent Bush, and of the other directors of the company, after receiving Evans's report and the balance sheet accompanying the same to lay such balance sheet, or some other true statement of the affairs of the company before the shareholders, and instead of doing this the said respondent and the other directors of the company concealed the true state of the company's affairs, and improperly prolonged the existence of the company, and thereby were enabled to transfer, or affect to transfer, all their shares therein."

Now I understand this to be an allegation (a very grave, and a very important one) to this effect; that a fraudulent scheme was originated and planned among the directors, having its origin at the time of the making of Evans's report in the month of April, 1858—a scheme to keep back from the shareholders of the company a knowledge of the true state of its affairs, and to keep back that knowledge for this purpose, namely, in order that the directors themselves, who held a large number of shares in the company, might have time and opportunity given to them to get rid of their shares, to leave the company, and to put other persons in their place to bear the responsibility which otherwise would have been theirs. My lords, I wish to state my opinion with regard to that part of the case at the outset, because I think it extremely important that, so far as my opinion goes at least, I should place upon record the view I take of it. Even if the whole of this grave allegation had been true, and true to the letter, it appears to me to state and allege a case which is not a case for a proceeding of settling contributories under the Winding up Act, but is a case for relief of a wholly different description. It is a case which, if proved to be true, and to be one which would entitle the person alleging it to any relief at all, the relief would be in the nature of a proceeding by a bill in Chancery to make those persons who had carried on the company, who had added to its liabilities, who had fraudulently concealed its affairs from the shareholders for the purpose of effecting their own end, answerable for the loss which had been incurred in carrying on the company, and to make them subject to an indemnity in favor of those who had sustained this loss. It appears to me to be a case wholly foreign to the purpose of a proceeding for settling contributories under the Winding up Act, where it appears to me that the question to be discussed and decided is whether a particular person was or was not at a particular time, or is or is not at the present time, a shareholder in the company.

But passing from that, which would be an observation with regard to the form of relief, I come to that which is of more importance, the substance of this allegation. Your lordships do not sit here as judges upon questions of morals, or of manners. If you did, I would take leave to say that for my part I entirely disapprove of much that I observe in the conduct of the affairs of this company by the directors. I disapprove of the manner in which the accounts and the books were kept. I disapprove to the want of frank communication, to the shareholders by the directors, of the state of the company, and of the neglect of the observations, be they well founded or ill founded, which had been made in regard to the affairs of the company, by the person they consulted, namely, Mr. Evans. I disapprove of the arrangements which were subsequently made for the purpose of entering into what was termed a working agreement with the Bank of Deposit, without there having been a fuller statement to the company of the object of that arrangement. But the question, and, as it appears to me, the only question which your lordships have to decide for the purpose of this appeal is this—were these things (treat them as censurable if you please) done by the directors for this fraudulent and evil end—to keep the company in the dark as to the state of its affairs until they, the directors, should have transferred, and in order that they, the directors, might transfer, their shares, and get rid of their own liability? Unless the case can be brought up to that which I have stated, all the other observations with regard to the conduct of the directors appear to me to be for the purpose of this litigation wholly immaterial.

Now, my lords, I have no hesitation in saying that I cannot *arrive at the conclusion that any of these things were done [61] by the directors for the fraudulent purpose to which I have referred. I am glad that in arriving at that conclusion I have the concurrence in opinion of the master of the rolls, before whom the case first came, of my noble and learned friend, the late lord chancellor, and of, I think, my noble and learned friend who last addressed your lordships, and even although my noble and learned friend who now sits upon the woolsack referred in some detail to the conduct of the directors, I do not know that he made it the *ratio decidendi* of the opinion which he offered to your lordships.

But now, without going through the history of the events of the year 1858 more in detail, I will state in a very few words the reasons which lead my mind, without any hesitation, to the conclusion that there was in this case no fraudulent object of the directors or of Mr. Bush with regard to the transfer of the shares. In the first place as to the retirement of the respond-

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ent and of the other directors, it appears to me to be proved beyond all doubt that the board of directors of this company was not a harmonious body. There were differences of opinion amongst them, and it was those differences of opinion themselves which led to the reference to Mr. Evans to examine the affairs of the company. The differences were not healed by Mr. Evans's report. Mr. Fitzpatrick, who had been one of those who had taken the strongest part against the majority of the directors, resigned. But the differences continued: It is perfectly apparent that after the first three directors resigned, owing to those differences, the resignation of the other directors was brought about, not at all with reference to the disposal of their shares, but in order that the body which is termed in these proceedings the Bank of Deposit, which was anxious to obtain a control over the working of this insurance company, and to enter into some arrangement with them, might substitute persons in its interest upon the board of directors of the insurance company. With regard, again, to Mr. Evans's report, I would observe that there was nothing whatever about that report which disclosed to the directors, or to any of them, anything that they did not perfectly well know before. They were no more informed of the state of the company after that report than they were before. The report was for this purpose of the simplest [62] kind. The books of the company for this purpose conveyed to the minds of any one having access to them all that the report itself showed, and I cannot accept the statement that it was Evans's report which put the directors in motion to leave the company and transfer their shares.

But there are three circumstances, my lords, which, more conclusively than any general observations which I could make, satisfy my mind that there was no fraudulent purpose on the part of the respondent. In the first place if there was this scheme — originating in the report of Evans, made at the commencement of April, 1858 — this scheme to get out of the company, to get rid of the shares of the directors, to get rid of the shares of Bush, how is it to be accounted for that from the beginning of the month of April, 1858, up to the beginning of the month of April, 1859, no one single step was ever taken by Bush, which can be pointed out, to get rid of or transfer any of those shares? For the space of a whole year after making of this report, which is said to have terrified the directors and to have made them anxious, hurriedly anxious, to get rid of their shares, whatever the other directors may have done, the respondent certainly appears for a whole year to have been perfectly quiescent, and to have taken no step whatever to get rid of a single share in the company.

But, my lords, the matter does not rest there, because you do find this piece of evidence which, so far as I can see, is entirely unchallenged in these papers, and it is supported by the testimony of two trustworthy witnesses, namely, Bush and the manager, as he is termed, of the company, Goold. The precise date is not given, but some time before April, 1859, a direct offer was made to Bush, to buy his shares from him. He had not solicited the offer; he had not placed his shares in the hands of any one for disposal. On the contrary, he states that when the offer was made to him he treated it as a jest, so little was he disposed to entertain it. The offer was this, the shares were £5 shares, and he was offered a price of 30s. a share upon the 400 shares, which would have made £600. He was offered that sum in immediate payment if he would consent to dispose of his shares. My lords, he refused the offer, he did not, it would appear, enter into any negotiation for a larger sum, but distinctly refused the offer that was made to *him. It appears to me that the full weight of that refusal cannot be properly estimated unless your lordships couple with it another circumstance. Not a very long time after this refusal had been made these shares were disposed of by Bush to Morrison. My noble and learned friend who first addressed your lordships referred to the agreement under which they were disposed of. That agreement stipulated that £2000, which is, I think, the par value of the shares, should be paid for them, but that it should not be paid at once, nor until after a lapse of, I think, two years or thereabouts, and that it should not be paid at all unless a certain profit or dividend had not been made by the company, or in case the company should be wound up under the Winding up Act. Taking these two circumstances together, nothing to my mind is more satisfactorily proved than this, that at this time Bush entertained a hopeful prospect with regard to the company, he refused that which was clearly a substantial offer of a sum of money, £600 in cash, and he preferred to wait for the chance of getting the whole value of his shares, although the chance of getting the whole value was accompanied by the correlative risk of losing every shilling upon the shares. I do not think that anything could more clearly indicate a reasonable expectation entertained by Mr. Bush that the company would yet be righted, and that the shares were of considerable value in the market.

Well but, my lords, this is not all. I have relied upon the circumstance that for a year the respondent Bush was entirely quiescent as to any attempt to get rid of his shares. I have relied upon the circumstance that when offered a considerable sum for his shares he refused it, and preferred to take the chance of

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getting a larger amount, even although it might be accompanied by the risk of losing the whole. But now there is this farther circumstance in the case — if it is true that the whole that was done during the years 1858 and 1859 was a fraudulent scheme concocted by the directors — if it is true that the company was kept in the dark upon the subject, in order that the directors might transfer their shares and get out of the company — if it is true that the directors, or some of them, left the company in a sudden and surreptitious way, in order that their going might not excite the alarm of the shareholders — if it is true that the (64) whole of the directors did get rid of *their shares in a manner which the shareholders of the company, if they had known of it, could not have approved of, would have challenged, would have deprecated, and would have found fault with, — then, my lords, I ask the question how it comes to pass that in the year 1860, a year after all this had taken place, when the whole was known, when it was proclaimed upon every document of the company that the whole of the board of directors had been changed and that a new board had been appointed, when the return of the transfers of shares in the company to the proper office had made it clear that every share of the old board of directors had been transferred, I ask how it came to pass when the shareholders came together in public meeting, as in fact they did in the month of September, 1860, and all this was known to the shareholders, that not a single shareholder rose at that meeting, challenged what had been done, complained of what had been done, and stated that the whole had been done in the dark and without the knowledge of the company, and that the company had been aggrieved by the conduct both of those directors who had gone out and of those directors who had come in?

My lords, we are dealing with these matters after the lapse of a number of years, but here are witnesses of the proceedings on the day when they took place. If there was anything wrong they must have known it. The company certainly, in 1860, was not in a flourishing condition. There was everything to excite the suspicion and distrust of those who were receiving no dividend upon their shares; but, in place of finding that any complaint was made, we find that the expressions of the meeting were entirely of an opposite character. Your lordships will observe that the report which was made by the new board of directors, and the proceedings of the meeting which followed the making of that report, was given to us at page 177 and the following pages of the Second Appendix, and anything more open than the character of that report I have never read. In place of endeavoring to conceal the change which had taken

place in the constitution of the company, the new directors began by saying that that was the very "first occasion on which the present board have had to give an account of their stewardship, having only been appointed at the last general annual meeting of shareholders, held in 1859." *They add that [65 they had not called the meeting earlier, because they "were anxious to ascertain thoroughly the position of the company, and to make themselves perfectly acquainted with the nature of its business before meeting the proprietary." They go on to say: "Your directors observe that their predecessors" (that is a wholly different board) "appear to have spared no pains to render the system adopted accessible to the general body of farmers." They go on to add, "they do not quite coincide with the anticipations expressed by your former board that the ratio of mortality will lessen to any material extent." This report was made by the directors to the shareholders, and I find that the following resolutions were put to the meeting and carried unanimously: First, "that The Right Honorable Lord Keane and Major James Adair" (who are persons implicated, if the allegations be true, in the gross fraud practised upon the shareholders — two of those directors who were implicated, I mean, as coming in the place of those going out) "be and they are hereby re-elected directors of the company, and that the appointment of Mr. R. W. Goold be confirmed." "That in accordance with the 120th clause of the company's deed of settlement to that effect, the directors be and they are hereby authorized and requested to call up the remaining portion of the capital." "That the thanks of the shareholders be tendered to the directors for their efforts during the past year. That the thanks of the shareholders be given to the manager for his untiring exertions in the company's interests."

Now I can quite understand that the appellants in this case, the executors of Mr. Houldsworth, whose testator had before this time left the company under arrangements which were the subject of discussion in another case that came before your lordships' house, whose testator was taking no part in the affairs of the company, I can quite understand that those executors afterwards discovering what appears to them to bear the character of a fraud should investigate it, and should make upon it such observations as occurred to them, as strangers, as being proper observations to be made. But it is perfectly clear that those who were shareholders, taking a part in the business of the company at the time, knew everything that had been done in the year 1859, and were perfectly satisfied with everything that had been done. They *were satisfied that the old [66 board of directors had gone out and that the new board of di-

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rectors had come in, and they were satisfied with the changes in the proprietorship of shares which had accompanied this change in the directorate, because these changes were all before them at that time.

I have gone into this matter at greater length perhaps than was necessary for two reasons, first, on account of the mode in which the case has been mixed up and embarrassed with references to these questions of conduct, and also because, there being grave allegations on the subject of conduct, I thought it was incumbent upon me to state to your lordships the conclusions at which I have myself arrived upon that which affects the personal character of those who are engaged in this litigation.

Therefore, my lords, I arrive at the conclusion that, upon the first ground, namely, the loss of capital to the extent of 80 per cent there is no reason to differ from the decision at which my noble and learned friend, the late lord chancellor, arrived in the court below. So also upon the question of alleged fraud, there is, in my opinion, every reason to concur in that decision, and in the conclusion at which he arrived.

That brings me to the third and last question in the case, which is a much more appropriate question, as it seems to me, to be discussed in a proceeding for settling contributories, namely, the question whether the 400 shares, which have been referred to, were validly transferred from Bush to Morrison, and whether it is Morrison or Bush who should stand upon the list of contributories as the shareholder and contributory in respect of those 400 shares. The shares undoubtedly were the shares of Bush. Undoubtedly, the name of Morrison was returned before the winding up of the company, and returned more than once, to the proper office, the office of the registrar of joint stock companies, as the shareholder, under a transfer made from Bush to Morrison. But the question is, was the transfer a valid and formal one? Now, before referring to a few of the sentences in the deed of settlement of the company which are material, I will ask your lordships to bear in mind what is the scheme under which shares were made transferable in this company. There are three, and, as it appears to me, only three rules, formalities, regulations (call them what [67] *you please) to be observed in order to effect a valid transfer of a share in the company, and I think your lordships will find it extremely convenient to bear these three requisites of a transfer clearly in mind. The first is, that the outgoing shareholder must enter into an agreement with some other person whom I will term the incoming shareholder, that the incoming shareholder shall take the place of the outgoing shareholder. There must be an agreement of that sort as between the out-

going shareholder and another person ; that is the first requisite. The second requisite is that the transferee, as I will term him, must be approved of by the directors of the company acting for the company. And the third requisite is, that the transferee must put himself into direct relations of contract with the company. He must come to the company and agree with it that he will observe the rules and regulations of the company comprised in their deed of settlement. My lords, these are the three requisites of a transfer of shares. If those requisites are complied with the transfer is good : if they are not complied with the transfer is invalid.

Now, my lords, let us apply the statement of these requisites to the present case. The clauses of the deed which are referred to as material are the 185th, 186th, and the 190th, and I will ask your lordships to be so good as to bear in mind what appears to me to be most material with regard to each of these clauses, namely, that they are affirmative clauses, and not negative clauses. When a person shall, by transfer, have become a shareholder of the company, the 185th clause provides, "That every person who shall be approved of by the board of directors as a holder of any share or shares in the company, and to whom a transfer of such share or shares shall have been made, and who shall not then be a shareholder of the company, shall, within one calendar month after such transfer, execute at the office of the company, or at such other place as the said board shall reasonably require, either in person or by attorney, a deed of covenant to abide by the rules and regulations of the company, whereupon such person shall become a shareholder of the company." That is an affirmative provision. The 186th provides for the preparation of the deed, and the 190th, which I must read at length, says : "That when and so often as any person or persons not a purchaser or purchasers *from the board of directors [68 shall, in the manner hereinbefore required, become a holder of any share or shares in the company, and shall have executed a deed of covenant to observe the covenants, agreements, and provisions contained in these presents, the last holder or owner of such share or shares, and all persons claiming through or under him or her other than the new shareholder or shareholders shall from the time of such new shareholder or shareholders becoming such, and on payment of such moneys," and so on, be "for ever acquitted and discharged from all further claims, demands, and liabilities in respect of such share or shares, and the certificate to be given by the directors, as hereinbefore mentioned, of such last shareholder having ceased to be a shareholder in respect of such share or shares shall be conclusive evidence of such acquittance and discharge in respect thereof." That is

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again an affirmative clause, stating at what time the old shareholder shall be acquitted of all liability.

Now what are the points in respect of which it is alleged that as a matter of formality the transfer of shares in this case was invalid? The first is that referred to by my noble and learned friend, which was very much argued at your lordships' bar, that there was not any proper approval of Morrison as a new shareholder and of the transfer from Bush to Morrison. Of course your lordships are well aware of the object for which an approval of a board of directors of this kind is to be given. The object is that a shareholder may not be able to substitute for his own liability that of some person who may be an insolvent, or may, at all events, not be sufficiently solvent to answer the demands which may be made against him. Of that question the board of directors is constituted the judge, to decide it on behalf of and for the benefit of the company at large. In the case before your lordships the approval was given, or rather professed to be given, at a board of directors. At that board, which was held on the 15th of April, 1859, there were present four directors. It is said that three of them—Lord Keane, Major Adair, and Mr. Morrison—were not *de jure* directors. They had agreed to take shares in the company; but it is said that they had not executed a deed binding themselves to obey the regulations of the company; that therefore they were not shareholders in the [69] proper acceptation of the term; that *not being shareholders, they could not be directors, and that the approval, therefore, given by that board of four persons was not the approval of four directors, for three of them were not qualified to be directors.

My lords, I will say nothing at this present moment with regard to the necessity of executing a deed to constitute a person a shareholder. I will assume that in favor of the objectors, on the ground that I have stated. Still it appears to me that this is an objection which cannot prevail. In the first place, in my opinion, it is an objection that, if it has any foundation, would be entirely cured by the 30th section of the Joint Stock Companies Act, 7 & 8 Vict. c. 110. That section provides: "That, notwithstanding it may be afterwards discovered that there was some defect or error in the appointment of any person acting, or who may have acted as a director of a joint stock company registered under this act, or that such person was disqualified; yet all acts done by him as such director before the discovery of such defect or error, either solely or with other directors, shall be as binding on him and on the company, and the directors and officers thereof, as if such person had been duly appointed or qualified, and if such acts were done *bonâ fide*, shall

be as binding on all persons whomsoever as if such person had been duly appointed or qualified."

It was contended here that this section could not apply because there was no subsequent discovery that there was any defect or error in the appointment. My lords, what are the facts of the case? We find that in the history of this company transfers amounting to something about eighty in number have been made from time to time of its shares to, I think, forty-one different persons. We find that out of those transfers, in every case except three, it had not been considered requisite to comply with this section of the deed of settlement of the company, that is to say that in thirty-eight cases out of the forty-one no deed had been executed or had been thought necessary to be executed. I do not stop to consider whether that was right or wrong, whether the directors would have power to dispense with the clause or not. I do not consider that at present, but I take the fact to be as stated that rightly or wrongly, carelessly or otherwise, this had grown up to be the practice *of the [70 company (I mean the practice of the executive of the company, the directors) that the execution of a deed by the incoming shareholders had not been thought necessary, but they had rested satisfied with his execution of the transfer. Let it be supposed that that was irregular, that it was a mistake to imagine that the directors could dispense with that provision in the deed of settlement. My lords, it appears to me that that is exactly one of those errors which are contemplated by the 30th section of the statute. It is one of those errors growing up from the practice of the company being itself erroneous which is repeated from time to time, and which, if not cured, will invalidate for mere error the proceedings of the company.

Therefore, it is exactly one of those errors which is to be cured by this 30th section, which provides that notwithstanding that it may be afterwards discovered that there was some defect or error in the appointment of the directors, any acts of those directors shall be valid. I apprehend if an error of that kind has been discovered, if it turns out upon legal investigation that that practice was erroneous, it was one of those things which this section would cure. Observe what would be the consequence if your lordships did not hold that to be the meaning of the section. It would not affect merely the transfer of these shares, but every act of these directors — that is to say, of these same gentlemen — must have been equally invalid. If this be a proper argument, everything which they did in the year 1859, in the year 1860, and in the year 1861 (for I do not find that they ever executed the deed subsequently) was invalid, and unless it is cured by the 30th section it has not been and

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cannot be cured at all. I think that would be a startling result if your lordships were to adopt such an interpretation of the clause.

But I do not stop there, because it appears to me that, independently of this clause, the objection is one which cannot prevail, and for this reason, your lordships have probably observed (I mentioned it incidentally before) that not only was there a return made to the registrar of joint stock companies about the date of which I am speaking, viz., April, 1859, immediately after this transfer of shares was made, as to which return there might be the same question, because it was signed by directors [71] upon whose title, perhaps, *the same observation might be made; but over and above that, the company having been reconstituted, having gone on carrying on business for a considerable time, having in the meantime registered the transfer of other shares, this same company, through its directors and through its executive, in the beginning of the year 1860, returned to the registrar of joint stock companies a fresh return of all the past transfers of shares, and included in that return to the registrar the transfer of the shares from Bush to Morrison stating the number in gross, stating the numbers of the particular shares, and stating the date of the transfer.

Now, my lords, let us bear in mind what is the object for which a board of directors is authorized to approve of a transfer of shares. It is to secure the company against an improper or an insolvent shareholder being substituted for a solvent one. But could it be tolerated that anybody connected with a company carrying on business in the course of which a transfer of shares had been made, say in the month of April, 1859, which had, I will not say, been approved of by a properly constituted board of directors at that time — I will assume that it had not — but had been returned by the company through its executive one year afterwards to the proper officer to receive such transfer returns, as a transfer which the company was content to approve of, could anybody, I say, connected with that company afterwards be allowed to turn round and say, “This Mr. Morrison, who was thus returned a year after the transfer was made, as a shareholder of the company, never was approved of by any board of directors, and is not a shareholder in the company because he has not received the approval of the directors?” Anything more contrary to common sense than a conclusion of that kind could, I venture to say, hardly well be conceived.

But, again, it does not rest there, because, I ask your lordships farther to observe this: To whom were those shares transferred? To Morrison. Who was Morrison? He was presented

to the shareholders of the company as their new director. The company at a public meeting received him as their new director. He could not have been their director unless he was a shareholder. In approving him as their director they approved him *dmulto fortiori* as a shareholder. Really, when the matter is thoroughly understood, *it comes to be not a question at [72 all of the board of directors approving of Morrison as a shareholder in the company, but of the company at large approving of him. And they approved of him twice over, in 1859, and in 1860, as a director of the company, at the time when he was sitting as a director of the company under the qualification of the shares transferred to him in April, 1859. My lords, so far as the approval of the board of directors is an essential for a valid transfer of shares I maintain that there was here an approval by the directors, and that there was here much more than an approval by the directors, there was an approval by the company at large.

My lords, passing from that I come to the next and only other ground on which the transfer is impeached. It is said that Mr. Morrison never executed that deed which is mentioned in the 185th section — the deed of covenant to abide by the rules and regulations of the company. Now here again I would ask your lordships to consider what the object and end of this rule was. It appears to me to be a very excellent rule, and to have a very excellent object. In a transfer of shares, as between the transferor and the transferee, the transferee always agrees to accept the shares and to hold them upon the same terms as the transferor held them. As between the transferor and the transferee, therefore, the execution of the mere transfer is an engagement by the transferee that he will stand in the shoes of the transferor, and by virtue of that transfer the transferee can always be bound, as between him and the transferor, to indemnify him against any demand the company may make. But the company requires something more. The company requires that the transferee should come forward to it, should put himself in direct relation and contact with it, and should agree with it, and not with a third party, to abide by the rules of the company, and to acknowledge himself to be a shareholder in the company. That I take to be the object of the 185th section, and that, I think, disposes of the argument that the execution of the deed of transfer alone would be sufficient. I do not think it would.

Now let us look at the substance of this transaction. If the transferee in this case had been one of the general public and a stranger to the company, it is quite clear that until he came *forward to the company and acknowledged himself a [73

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shareholder the company would have had no control over him as such. But who was the transferee here? The transferee was Morrison. But who was Morrison? Morrison immediately upon receiving a transfer of these shares, and of the other shares, of which he became a proprietor, was elected a director of the company. He became a director of the company, and he acted as a director of the company from that time until the time when the company was wound up. And not only that, but Morrison, as one of the directors of the company (for the act was the act of the whole), returned to the registrar of joint stock companies immediately after the transfer of the shares, and returned again in the beginning of the year, 1860, himself as the proprietor of these 400 shares.

Supposing Mr. Morrison had turned out to be a rich man, and supposing Mr. Bush had turned out to be an insolvent man when the company came to be wound up, I ask the question, would Mr. Morrison have been heard, in any court of equity in the country, to say that he was not the owner and proprietor of these 400 shares? Could he even have said this, "Whether I am the proprietor or not is a matter between me and Bush; Bush must be put upon the list, he may have some claim over against me for an indemnity?" I say that he could not. I say that the moment that he assumed the directorship of the company, and returned himself to the registrar of joint stock companies as the proprietor, by transfer, of these 400 shares, he became, to all intents and purposes, as much as if had executed 100 deeds one after the other, the owner of these shares, as between himself and the company, and the person directly responsible to the company to abide, in respect of those 400 shares, by the rules and regulations of the company laid down in their deed. And, my lords, with great submission to those who think otherwise, I say that it is adhering to the letter and misapprehending the spirit of this affirmative rule if you read this rule as if it were couched in negative terms, and as saying no other adhesion, however formal or solemn, to the rules and regulations of the company, shall be sufficient unless the form is gone through of putting your wax to a deed prepared in a particular way.

74] *It has happened, we are told, that Mr. Morrison cannot be forced to make good sums which ought to be forthcoming. I assume, by this appeal, that it is thought that the result of proceedings against the respondent may be very different. But, my lords, we are not to decide the question by that event. It appears that Mr. Morrison, at the time he was received into the company, was considered a person whose adhesion to the company was thought desirable and advantageous. In my opinion

he became a shareholder of the company and the proprietor of these 400 shares, and, in my opinion, in him, and in the transfer to him, were fulfilled and realized every one of the three requisites of a valid transfer to which I have referred. He had assented, as between himself and Bush, to take the shares. He was approved of, as I stated to your lordships, not merely by the directorate of the company, but by the company itself. He had come to the company, and, as its director, had solemnly engaged himself by the acts, to which he was a party, to be the proprietor, and to stand as the proprietor of these 400 shares, and so comply with all the rules and regulations of the company with regard to them. My lords, in my opinion the transfer was valid, and the objections made to it do not prevail.

I will only add that I have looked into this case, and considered the law applicable to it, with very great anxiety, and that for this reason, there have been several cases decided with regard to this company, some of which have come to your lordships' house. In some of these cases persons who thought that they had been entirely acquitted of all demands of this company have found that they were laboring under a mistake, and, contrary to their expectation, after a great lapse of time have been placed on the list as contributories to the company, and, I believe, the present appellants, the executors of Mr. Houldsworth, are persons who are in that position. I own that it has been to my mind a matter of great anxiety lest, possibly, the conclusion at which your lordships might arrive in this case should appear to those persons present, to deal out to the respondent in this case a less severe and exact measure of justice than was dealt out to those other persons, in the cases to which I have referred. But I desire to point out, and I think it can be done most distinctly, the clear *difference between this [75 case and those others which I have mentioned. In those cases persons who were shareholders in the company endeavored, perfectly, honestly, and fairly, to extricate themselves from the company by arrangements which in no way were authorized by the deed of settlement, and the directors of the company proposed to release them from the engagement of the company not by an attempt at compliance with the forms of the deed of settlement, but by arrangements which in no shape or sense were authorized by the deed of settlement; and the question in all those cases really was this, not, whether the deed of settlement was complied with, for no one ever pretended that it had been, and no one ever pretended that, had those matters been challenged soon after they occurred, it would have been possible to defend them, but the question in those cases was, whether there had not been such a lapse of time, whether there had not been such

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a knowledge on the part of the company, and such a condonation of the irregularities in the transfers which had taken place, as would of themselves prevent the persons who thought they had left the company being restored as contributories to its engagements.

The case here is altogether different. It is perfectly clear that in this case every one intended that the transfer should take place in a way that would release Mr. Bush from his shares and put Mr. Morrison on as a proprietor. It is perfectly clear that every one intended to proceed exactly in accordance with what they thought were the exigencies of the deed of settlement. My lords, if even, notwithstanding that intention on their part, I had found that in any point of substance they had failed to observe those requisites upon which alone a transfer of shares could take place, I should have been obliged, even in this case, to hold that the attempted transfer was invalid, and that the transferor should remain liable in respect of his shares. But, for the reasons which I have attempted to explain, I have arrived at the conclusion that the formalities were in every substantial way complied with upon the occasion of the transfer; and, therefore, my lords, I should humbly advise your lordships that the appeal which is now before us should not succeed, but that the judgment of the court below should be affirmed.

76] *LORD HATHERLEY: My lords, I shall state extremely briefly my reasons for adhering to the opinion which I formerly expressed in the Court of Chancery upon the case which is now before your lordships for consideration. I have, it is scarcely necessary to say, most anxiously reperused and reconsidered the opinion which I then delivered, and I have had an opportunity of so doing with the assistance of my noble and learned friend who is now sitting on the woolsack; for he kindly communicated to me his opinion on the subject; and finding that there was a difference of opinion between himself and myself, I felt the more doubtful and hesitating as to whether or not I had arrived at a correct conclusion. But after having had the advantage of knowing, and now of hearing fully delivered the opinions of that noble lord, I have not been able to satisfy myself that I in any way erred in the first instance; and I have certainly been greatly confirmed and strengthened in my view by the opinion which has been expressed by the noble and learned lord who last addressed your lordships, whose opinion has been so fully and clearly stated as to render it scarcely necessary for me to add another word on the subject.

I do, however, feel desirous of saying that I have with special anxiety considered the question of the *bonâ fides* of the transaction; because, although I fully agree and sympathize with my

noble and learned friend who spoke last as to the extreme inconvenience of having questions of fraud and misconduct on the part of those who had the management of a company introduced in this singularly irregular and ineffective mode, namely upon an application to substitute one name for another on the register, yet I must say that there is a bearing of that view of the case upon the effect of the transfer which must have had its due weight given to it if it could have been satisfactorily proved to your lordships that any fraudulent intention had existed. In the first place it would very materially have diminished, or rather, I might say, have entirely prevented, the effect of the 30th section of the act of 7 & 8 Vict., which says that acts done by those *de facto* purporting to be directors shall be valid, even although it is subsequently discovered that there was some error in their appointment. It would most materially have affected the operation of that section *if it had been shown that in the [77 breasts of those parties who purported to act as directors there had all along been implanted a consciousness that they were not such directors at all, that they had been fraudulently and improperly appointed, that they had been appointed for an improper object, and therefore could not, in any sense, be said to have fallen within the scope of a clause which has for its purport and effect the correction of all injuries to others in consequence of innocent misapprehensions which may have taken place with regard to those who are *de facto*, and, as they suppose, *de jure* exercising the rights of directors. But farther than that, if it could have been shown that this, instead of being an actual sale and transfer of shares, was a mere mode of shuffling off responsibility, that it was never intended to operate as a real and substantial transfer, that it was, in fact, a comedy between the parties to it in order to deceive third persons; then, again, a very serious question would have arisen as to whether or not the name of Mr. Bush should not continue upon the register as it had originally been placed there, and the name of Mr. Morrison, who was merely brought in to play his part in the comedy, erased therefrom.

My lords, I have had great satisfaction in finding that the noble and learned lord who first addressed your lordships has not, although he is not satisfied, as he has said, with all that has taken place with reference to the proceedings of Mr. Bush in this transaction, adopted the view of this being a fraudulent concoction between Mr. Bush and Mr. Morrison; and that as far as regards the noble and learned lord who first decided this case, the master of the rolls, and the noble lord who sits opposite to me and who addressed your lordships second on the present occasion, as well as my noble and learned friend who

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addressed your lordships last, there is a general concurrence of opinion, or acquiescence in the opinion, that no such fraudulent intent has been in any way manifested or declared throughout the course of the transactions.

I noticed on the former occasion, as regarded the position of the company, the extreme difficulty of any person knowing exactly what the position of a company of this character was. We know, from painful experience, by what has recently occurred, how extremely difficult it is, even with persons having [78] the best intentions, *with regard to the well known subject of the insurance of human life, to arrive at a thoroughly just conclusion as to the correct data upon which that insurance should be conducted; but as regards this question of the insurance of cattle, I suppose there are not sufficient data in existence at the present moment, and certainly there are no tables in existence by means of which we could arrive at a perfectly clear and sure basis upon which to demand premiums in respect of such insurances. We do not however require, for the purpose of the present case, to speculate on this subject. The very question as to the difficulty of arriving at a knowledge of the exact position of a company of this kind was before Lord Cottenham in the case of this very company, in a case which is reported in the first volume of *Macnaughten & Gordon* ⁽¹⁾. There it was sought to wind up the company in the year 1848. Two questions arose: first, whether it was a company within the provisions of the Winding up Act; and, secondly, if so, whether the company had been shown to be insolvent. Lord Cottenham considered the last question first, as he said, to avoid coming to any unnecessary conclusion on the first point; and being clearly of opinion that insolvency had not been shown, he commented upon the extreme difficulty of ascertaining whether a company engaged in such transactions as the present was or was not insolvent until some better data existed than existed at that time with regard to the exact amount of premiums to be charged, and the exact amount of risk incurred in an insurance of such a novel description. It appears that all this matter was discussed from the year 1848 to the year 1858, and that, in consequence of these very difficulties, the premiums had been raised, in consequence partly also, I believe, of the cattle plague having then been introduced into this country.

As far as I can see from any part of the evidence before your lordships, there does not seem to have been any reason for apprehending, at the time when these transactions took place, that the company was in an insolvent condition, the only ground for that alleged appearance of things being the report of Mr. Evans.

⁽¹⁾ *Quære Ex parte Spackman*, 1 M. & G., 170; 18 L. J. (Ch.), 261.

I commented on the report of Mr. Evans on a former occasion at some length, and my noble and learned friend has also commented upon it, and given a far more clear and distinct [79 analysis of what the true effect of that report must be taken to be. I do not intend, therefore, to repeat myself on that subject.

But there is one single remark which I wish to make with reference to Mr. Bush's transfer of his shares, as regards his *bonâ fides* in doing what he did in 1859, when the transfer was effected, and his views of the position of the company at that time. It has already been observed by my noble and learned friend who spoke last, that Mr. Bush did not hawk about his shares, that he made no tender of his shares to any one, that he was applied to to sell, that he was offered a price for his shares and that price being considerably below par he altogether refused to receive it, and he ultimately only came to this agreement to sell his shares in the firm belief, as he has asserted — and there is every reason on the face of the agreement to suppose that to be so — that the shares were worth their full value at par. The agreement he entered into, after he might have obtained a sum of £600 down, was an agreement that he was to be paid £2000 in two years' time, but that if the concern did not succeed (so confident was he of success) or, if it was wound up within two years, then that he should be paid nothing whatever.

And this farther remark, which was made by my noble and learned friend in his address to your lordships, arises upon the transaction, that the transfer to Mr. Morrison was in no way necessary on the part of Mr. Bush for the purpose of constituting him a director, or for carrying out any such fraudulent purpose as has been suggested, because Mr. Morrison had already had a transfer of a sufficient quantity of shares from General Hope to qualify him as director, provided that the other difficulty had not existed with respect to the deed of adherence to the company not having been executed. That being so, there was no motive such as has been assigned to Mr. Bush for the transfer of these shares in order to create Mr. Morrison a director, and to substitute him as a director in the place of Mr. Bush. It would have been quite sufficient to rest the matter on General Hope's transfer, and Mr. Bush might have retired from the directorship and disposed of his shares in any manner he thought proper, if he had not thought fit to sell them, in the manner which has been described, to Mr. Morrison.

*Farther, from the fact of 30s. per share being offered to [80 him, I think your lordships have a strong presumption at once that the company was by no means considered, either by the outside public, or by those persons who were possessors of

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shares, to be in a hopeless condition. Persons do not give 30s. a share to take part in a concern which is quite hopeless. The sum is too substantial for that. No doubt the concern was in a depreciated condition, but there is not one reason on the face of these proceedings from beginning to end for thinking either that Mr. Bush or anybody else (certainly not Mr. Bush, who refused 30s. per share) thought that the company was in that condition of extreme depression which it afterwards turned out *de facto* in the result to have been.

Now having said so much, I do not enter again into that part of the argument as to whether or not the transfer was valid, because it has been wholly exhausted by the address which has just been delivered to your lordships. It appears to me, I confess, that the parties might have relied on the 30th section alone, considering the *bonâ fides* of the transactions, for the act of the *de facto* directors being valid; because it is no answer to that to say that they knew they had not executed the deed. The question is whether they knew that not executing the deed would invalidate their position as shareholders, and consequently their position as directors; for although the maxim "*Ignorantia juris non excusat*" is particularly applicable to any case in which you seek to put responsibility on a party, yet that very ignorance of law as I apprehend, a portion of that state of ignorance which is meant to be excluded expressly by the 30th section of the act, in order to render valid as regards third parties who are dealing with such persons, those acts which are performed by them in the ministerial performance of their duty. I apprehend, therefore, that the circumstance of these directors not having executed the deed would not, even if it had been a fatal objection to their position, have invalidated the acts which they so performed.

But farther than that, I wish to call your lordships' attention for a single instant to the 186th section of the deed of settlement, which, as well as the 185th section, is important to be referred to upon this subject. The 185th section directs that the deed shall be executed at the office of the company, or at such other place as the directors shall appoint. I quite agree with my noble and learned friend who first addressed your lordships, that that does not mean that they are to dispense with the execution of the deed altogether, but it simply says that they are to direct it to take place wherever they shall think fit. But the 186th section is important in this point of view. It provides that the deed of adhesion itself shall be prepared by the directors, and it is then to be propounded by them to the person who is becoming a new shareholder. Now that is a point which is

important in this respect. It does bring the case extremely near to the case of *Bargate v. Shortridge*, in which it was distinctly held that the directors cannot rely upon any default of their own in the non-performance or non-execution of a deed. It was the duty of the directors to have this deed prepared; it was the duty of the directors to have it executed by Mr. Morrison no less than it was the interest of Mr. Bush, who was retiring, to have it done; it is true that it was his interest to have it done, but it was no part of his business to have it done, and he could have taken no part therein. He, as transferor, having got rid of all his shares, could have taken no part beyond seeing that Mr. Morrison did execute the deed when propounded to him by the directors, and if Mr. Morrison declined so to do, he would have been obliged to take legal proceedings to compel him to execute it. But it being incumbent, in the first place, on the directors to see that the thing was done, I apprehend that it was impossible for them to say to Mr. Bush afterwards—"That not having been done which it was our duty to see was done, you shall still remain shareholder, although we have formally returned by our certificate this transfer as having been made to Mr. Morrison, because we have not taken care that Mr. Morrison executed that deed which he should have executed within the subsequent month."

My lords, I wished on the present occasion merely to refer to those two points, because in my former opinion I have so fully stated all the reasons for arriving at the conclusion I arrived at, that I should think it a waste of your lordships' time if I were to repeat those views. I frankly confess that I feel greatly relieved in this matter by having the concurrence of my noble and learned friend who spoke last, and who has expressed far *more clearly than I have done either on the former occa- [82 sion, or on this, the grounds, valid grounds, as it appears to me, for arriving at that conclusion.

LORD CHELMSFORD: My lords, I would submit to your lordships' consideration whether the present affirmance of this order should be with or without costs.

LORD CAIRNS: I do not know that it can be suggested that there is any absolute rule upon that subject. In a case which has caused such difference of opinion, and upon which such difference of opinion might well be entertained, as on this case, your lordships would not be disposed, I think, to say anything as to costs. Let the order be that the appeal is dismissed without any mention of costs. I forget whether the case was argued by the official manager, or only by counsel for the executors of Mr. Houldsworth. The costs of the official manager are always dealt with in a winding up.

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The Solicitor General: The official manager does not appear before your lordships. He will get his costs in the court below.

LORD HATHERLEY: I acquiesce in the view which has been expressed by my noble and learned friend. Certainly upon the former occasion I gave no costs, for I thought that the parties themselves were in a great degree responsible for the large amount of confusion which there has been in these transactions.

Order appealed from affirmed; and appeal dismissed.

Lords' Journals, 5th May, 1873.

Solicitors for the appellants: *J. Elliot Fox, for Earle, Son, Oxford, Earle, & Milne.*

Solicitors for the respondent: *Warry, Rodins & Burgcs.*

[Law Reports, 6 House of Lords, 83.]

June 28; July 1, 4, 5, 1872. Feb. 24; May 5, 1873.

83] *JAMES RANKIN and OTHERS, Appellants; and LEWIS POTTER and OTHERS, Respondents.

Insurance—Total Loss—Perils of the Sea—Other Causes—Abandonment—Notice.

It is a principle of insurance law that no abandonment is necessary where there is nothing which, on abandonment, can pass to or be of value to the underwriters. Where, therefore, there was a policy on ship, and also on charterparty freight (that is freight to be earned by the carriage homeward of a cargo chartered to be put on board at a distant port), and the ship was so injured on the outward voyage that the shipowner abandoned to the underwriter on ship, there was nothing to pass to the underwriter on charterparty freight, and, consequently, there was no necessity for abandonment to him.

The damage to the ship from perils of the sea during the voyage, covered by the policy on ship, being such as to justify abandonment to the underwriter on ship before the cargo was put on board, the insured freight could not be earned, and there would therefore be a total loss on the policy on freight.

A ship sailed on its outward voyage to New Zealand. More than a month afterwards the owners chartered it to M. to bring home a cargo from Calcutta. By this charterparty, after discharging at New Zealand, it was to sail to Calcutta, and being there "tight, staunch, and strong, and every way fitted for the voyage," the charterer bound himself to put on board a specified cargo for England at a stipulated freight. The owners then effected a policy, in the usual form, against perils of the sea, &c., upon the freight to be earned on this homeward voyage.

The ship was seriously injured in the outward voyage; it was repaired as well as the master, with insufficient funds, and at a place not capable of making full examination and effecting complete repairs, could get it repaired; and with the ship thus partially repaired he sailed from the place where the ship then was, and arrived at Calcutta, where the fullest examination and the completest repairs could be had. He immediately tendered the ship to the agents of the charterers for the homeward cargo. They, on the ground that the charterer had become bankrupt, refused to load a cargo. The master then had the ship fully examined, and it was found that the injuries on the outward voyage had been such that the complete repair of the ship, to render it fit for the voyage home, would exceed the value of the ship when repaired, and the amount of freight to be earned. The owners, on receiving this intelligence, abandoned:

Held, that this was a loss of freight occasioned by the perils of the sea:

Held, also, that no notice of abandonment to the underwriters on freight was necessary:

Held, also, that, if a notice of abandonment to the underwriters on freight had been necessary, the notice here would not, under the circumstances, have been too late.

This was an appeal against a judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Common Pleas ⁽¹⁾.

*The facts having been fully stated in the reports of the [84 case in the courts below, it is not necessary here to give more than a summary of them. The respondents in the appeal (the plaintiffs in the court below) were mortgagees in possession of the ship *Sir William Eyre*, which, under the command of Captain Blakey, sailed, on the 7th of December, 1862, from Greenock, bound to Southland, thence to Dunedin, in Otago, New Zealand, having on board a general cargo and a large number of emigrant passengers.

On the 9th of February, 1863, the ship being then on its outward voyage, Messrs. Potter entered into a charterparty with one De Mattos, by which it was agreed that the ship after discharging cargo and landing passengers at Otago, was to proceed to Calcutta, and there, "being tight, staunch, and strong, and everyway fitted for the voyage," should take in a cargo to be provided by De Mattos, and bring the same to Liverpool or London. The freight agreed upon was "£4 per ton until delivered, such to be computed according to the tonnage scale of the Bengal Chamber of Commerce." After entering into this charterparty, Messrs. Potter effected a policy on this chartered freight, in which the voyage was described as "at and from the Clyde to Southland, whale there, and thence to Otago (New Zealand), and for thirty days in port there after arrival," with leave to call at intermediate ports. "And it shall be lawful for the ship, in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever without prejudice to this insurance. The said ship, &c., goods and merchandise, &c., for so much as concerns the assured, by agreement between the assured and the assurers in this policy, are and shall be valued at £4000, on homeward chartered freight valued at £ ."

The ship sailed from Greenock on the 7th of December, 1862, and arrived at Bluff Harbor, Southland, on the 23d of April, 1863, and immediately afterwards took the ground there. On the 22d of May the ship floated, and on the 27th of May a survey was held. On this survey the report made was that the ship appeared to have sustained no damage which would prevent it from proceeding on the voyage, but that it might safely proceed to its final destination. As, however, the surveyors were "not

(1) *Law Rep.*, 3 C. P. 562; *Ibid.*, 5 C. P., 341.

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able to ascertain if any damage was done to the vessel below water," they recommended that it should be re-surveyed and its bottom examined "at the first convenient port." Some other 85] groundings *occurred, and it was not till the 1st of July that the vessel was able to leave for Dunedin. On the 4th of July it arrived at Port Chalmers, which is the port of Dunedin. Surveys were made there, but they were necessarily of an incomplete kind, for there was no dry dock or patent slip in New Zealand, and consequently the real nature and extent of the damage the vessel had sustained could not there be discovered, although at Port Chalmers the cargo had been totally discharged. The ship remained at Port Chalmers, and while there the captain (who could not obtain the funds he wanted), in order that his stay might not be wholly unproductive to his owners, allowed the ship to be made a depot for coals, and received as rent a sum of £778 3s. 5d. Though the ship could not have been fully examined and repaired at Port Chalmers, such an examination could have been had at Sydney, which was only eight days' sail from that place. It did not appear, however, that the master knew of this, and, believing that the ship was not seriously injured, but might proceed safely to Calcutta in ballast, he, on the 14th of April, 1864, as soon as he had received remittances from his owners, and some temporary repairs had been effected, sailed for Calcutta, where he knew that all necessary repairs, whatever they were, could be done. He arrived there on the 7th of June. On his arrival he went to the agents of De Mattos, and called on them to carry out the charterparty and put a cargo on board; but De Mattos had, in December, 1863, stopped payment, and his agents therefore declined to act for him in the matter.

The ship was put into a dry dock at Calcutta, and surveyed several times. The surveys and estimates showed that if the repairs really necessary to make the ship seaworthy, and enable it to bring home a cargo, were executed, they would exceed the value of the ship when repaired; and one paragraph of the case (par. 24) stated, "It is admitted that the sea damage which the ship sustained at New Zealand, during the time covered by the policy, was such as would have justified an abandonment and claim for a constructive total loss." At the time of the departure of the ship from Greenock, in December, 1862, it was worth about £8000; in Calcutta, when unrepaired, it was worth about £3000. The surveys and estimates were duly forwarded to Messrs. Potter, and on the 2d of August, 1864, on receipt of 86] the last of them, which *was dated in the previous June, Messrs. Potter gave to the underwriters notice of abandonment and of claim as for a total loss.

The ship, after the surveys, was moored in the Hooghly, and whilst so moored was, on the 5th of October, 1864, totally wrecked in a cyclone.

Upon the trial of the cause at Guildhall, before Lord Chief Justice Bovill, a verdict was taken for the defendant, with leave to move to enter it for the plaintiff. A rule obtained for that purpose was, in Trinity Term, 1868, discharged ⁽¹⁾, but in the Exchequer Chamber the decision was reversed ⁽²⁾, it being considered by the majority of judges there that the ship, by perils of the seas, had been incapacitated from earning the freight; that the assured were not bound to repair at any cost in order to earn the chartered freight; but, on the contrary, were entitled, as prudent men, to decline such repairs, and to abandon the vessel; that by abandonment of ship they did not lose their right to claim for a total loss of this chartered freight; and that, under the circumstances, the delay of the giving notice of abandonment was sufficiently accounted for, and the notice, if notice was necessary, was not too late. Mr. Baron Cleasby dissented from this decision, being of opinion that the loss of the freight must be treated as occasioned by the act of abandonment, and not by the perils of the seas; that the abandonment was an election which disabled the assured from recovering as for a total loss of freight by constructive total loss of the ship; that notice of abandonment was necessary, and that the notice given in this case was too late.

This proceeding in error was then brought. The judges were summoned, and Mr. Baron Martin, Mr. Baron Bramwell, Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Keating, and Mr. Justice Brett attended.

Mr. *Benjamin*, and Mr. *Cohen*, for the appellant: The questions in this case are, whether a notice of abandonment was necessary, whether it was given in proper time, and whether the incapacity to proceed on the voyage and to earn the freight insured arose from the perils insured against, or from the conduct of the parties themselves.

*The facts here show, that whatever was the result of [87 the perils of the sea had happened in August, 1863, just one year before the notice of abandonment was given. If, therefore, a notice of abandonment was necessary, it was not given in proper time. The assured has an election; he is not bound to abandon: Phillips on Insurance ⁽³⁾; but when he makes his election he must give notice of it in proper time, and he must abide by the consequences of his election. Here the master, who was acting for the owners, made the election to go on with

⁽¹⁾ Law Rep., 3 C. P., 562.

⁽²⁾ Law Rep., 5 C. P., 341.

⁽³⁾ Sect. 1483.

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the adventure; it was made with full knowledge that the vessel had suffered severe injury. Having made their election, the owners cannot be allowed many months afterwards to change their minds and throw all the loss on the insurers.

The loss was not occasioned by the perils of the sea, but arose from other causes. After reaching Calcutta the ship was tendered to the charterer, and he was called on to put a cargo on board, in conformity with his charterparty. The ship was then treated as a ship capable of taking the chartered cargo to England. The refusal to put it on board made by the charterers' agents at Calcutta, and not the injury to the ship from perils of the sea, was the real cause of the loss of the freight, and it was also the real reason for the abandonment. The tender of the ship for a cargo, and the formal demand that the charterer should put one on board, showed that the owners were then acting as if no ground for abandonment had arisen from the perils of the sea, and manifested their election to continue, and not to abandon, the adventure. Now (at all events by the American law) "the insurers ought to be informed of the grounds of abandonment, that they may determine whether to accept:" Phillips on Insurance ⁽¹⁾, quoting *Suydam v. Marine Insurance Company* ⁽²⁾, and several other cases. There seems to be no good reason for saying that in this respect there is any difference between the law of the two countries. That is an additional ground for requiring the time of abandonment to be given in reasonable time.

The interest insured here was not freight, but an interest to be derived from the charterparty on procuring a cargo, and so [88] earning *freight. The underwriter, therefore, did not insure freight; he did not insure even a chose in action — an existing right to a certain amount of money — but only a mere speculation, a claim on the part of the assured to have a home-ward freight supplied to him. Nothing short of what would amount in law to the destruction of the ship could justify the owner in claiming for a total loss of freight: *Moss v. Smith* ⁽³⁾; *Rosetto v. Gurney* ⁽⁴⁾. He might have lost that from causes other than the destruction of the ship. Here he did lose it from other causes, namely, the insolvency of the charterer and the consequent refusal of the charterer's agents to supply a cargo. That cause of loss was not a thing insured against. All that the insurer undertook was to indemnify the owner against the loss of the freight on the cargo by the destruction of the ship through perils of the sea. He would have had a right to repair the vessel; and till he had made his election whether he would go

⁽¹⁾ Sect. 1684.

⁽²⁾ 1 Johns. (N. Y.), 181, 2d Ed., 188.

⁽³⁾ 9 C. B., 94; 19 L. J. (C.P.), 225.

⁽⁴⁾ 11 C. B., 176; 20 L.J. (C.P.), 257.

on with the adventure or abandon it (at least within some reasonable time), the insurer might be bound. But when he did elect to go on and disregard all the injuries which the perils of the sea had caused, he lost his right to abandon on account of those perils. There is no case in which, after full knowledge by an owner of the damage done to his vessel by perils of the sea, he has been allowed to go on as if those perils had never occurred, and then, after finding out that he was taking an unprofitable course, to claim to abandon the adventure, founding his claim on injury from those very perils which he had previously disregarded. *Fleming v. Smith* ⁽¹⁾ expressly established these points. Lord Campbell there, adopting the term "constructive total loss," gives as the test that "if a prudent uninsured owner would not have repaired the vessel, but would have sold it to be broken up, that amounts to a total loss." If he will not do so, but chooses to go on with the adventure, it is not a total loss; it is then only a constructive loss, and notice of abandonment becomes absolutely necessary. He may wait till he gets complete information, or he may elect without getting it; but in either case his election binds him. And here it is a fact that the vessel itself was insured with other people, and a total loss claimed on the vessel as happening months before, while the abandonment here treated the loss as having occurred months afterwards. The two things cannot be allowed to stand together. It is impossible that, even in point of law, there can be two separate losses of one vessel in the same voyage. If this vessel was in existence as a ship at Calcutta, it could not have been totally lost at Bluff Harbor. Yet here the loss of the chartered freight is alleged to have been occasioned by a total loss of the ship at Bluff Harbor.

The propositions in point of law for which the appellant contends are these: first, that by the insurance law of England, where the thing exists in kind, however deteriorated or damaged, there can be no total loss without abandonment; secondly, the doctrine of abandonment itself takes its rise in the necessity of imposing on the assured the duty of election; thirdly, the election once made is irrevocable, the rights of all parties are determined by the act of election, and cannot afterwards be altered.

Nobody pretends to doubt this last proposition, but an exception is here sought to be introduced upon it by saying that in this case, owing to the particular nature of the insurance, abandonment was not necessary. Why not? First, it is said, because this was an insurance, not on ship, but on freight, and that as that was freight to be earned, there was nothing to abandon. Next, that if necessary, there was here an abandon-

(1) 1 H. L. C., 513.

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ment. But if abandonment was necessary, then comes the question whether there was abandonment in proper time.

[THE LORD CHANCELLOR (Lord Hatherley): Do you contend that in this case there was no loss by perils of the sea?]

There was not, under the circumstances which existed here. The earliest cases on this part of the subject are *Martin v. Crokall* ⁽¹⁾; *Cambridge v. Anderton* ⁽²⁾; and, particularly, *Roux v. Salvador* ⁽³⁾, since recognized in this house ⁽⁴⁾ in *Fleming v. Smith*, though treated there as inapplicable on account of particular facts. The whole law of abandonment was, in *Roux v. Salvador*, discussed by the chief baron, Lord Abinger ⁽⁵⁾; and the result arrived at is, that where constructive total loss is claimed there must be an abandonment, and that abandonment must be made 90] in reasonable time, *and cannot be made after there has been a clear election to prosecute the adventure. These cases negative the "deathblow" doctrine, which would have got rid of the necessity for abandonment under certain circumstances, and they firmly establish the principle that if an assured means to insist on a total loss, he must give a proper notice of abandonment.

The next point is as to the conduct of the master. *Benson v. Chapman* ⁽⁶⁾ was originally decided in favor of the assured, but the decision was reversed in the Exchequer Chamber, and the reversal sustained in this house ⁽⁷⁾. There the master had elected to repair, and actually brought home the ship. It was expressly found that everything had been done *bonâ fide*, yet an election having been made, the assured was held not to be entitled to recover as on a total loss. *Knight v. Faith* ⁽⁸⁾ is another instance where the circumstances not constituting an actual total loss, the assured were held bound to give notice of abandonment, and the "deathblow" doctrine was in reality repudiated. In *Stewart v. The Greenock Marine Insurance Company* ⁽⁹⁾ there was a faint attempt to re-establish the "deathblow" doctrine; but in *Knight v. Faith*, with reference to this very matter, Lord Campbell said ⁽¹⁰⁾: "It was argued before us that the ship must be taken to have actually perished, because it is stated that while under the protection of the policy she received her 'deathblow' by the perils insured against; but we cannot give such weight to this metaphorical expression. We are bound to look to her actual condition after the injury she had sustained and the manner in which she was treated. We still find her

⁽¹⁾ 14 East., 465; but see *Read v. Bonham*, 3 B. & B., 147.

⁽²⁾ 2 B. & C., 691.

⁽³⁾ 3 Bing. N. C., 266.

⁽⁴⁾ 1 H. L. C., 513.

⁽⁵⁾ 3 Bing. N. C., 275, *et seq.*

⁽⁶⁾ 6 Man. & G., 792; 7 Scott, 625; 5 C.B. (Ex. Ch.), 530.

⁽⁷⁾ 2 H. L. C., 696.

⁽⁸⁾ 15 Q. B., 649.

⁽⁹⁾ 2 H. L. C., 159.

⁽¹⁰⁾ 15 Q. B., 656.

surviving as a ship, with her crew on board, several weeks after the risk had expired." So here, several months after the risk had expired, this ship actually sailed on a voyage to Calcutta and arrived there, and, existing as a ship, was tendered to the charterer to bring a cargo to England. In *Knight v. Faith* ⁽¹⁾ the ship was actually sold in the port it had reached for the sum of £72, yet, there not having been a proper abandonment, the owner could only recover as for a partial loss. *The Scottish Marine Insurance Company v. Turner* ⁽²⁾, was, in fact, *a conse- [9] quence of the previous decisions in *Fleming v. Smith* ⁽³⁾ and *Benson v. Chapman* ⁽⁴⁾.

It is admitted that there are cases in which there may be a recovery as for a total loss without abandonment: *Green v. The Royal Exchange Assurance Company* ⁽⁵⁾, *Idle v. The Royal Exchange Assurance Company* ⁽⁶⁾, and *Moult v. Harrison* ⁽⁷⁾; but in all these cases there was an actual stranding, and the sale was effected at the moment as the best thing for the interests of all concerned. Here the circumstances were very different. The facts show that an irrevocable election was made. The master sailed from Bluff Point to Dunedin with the ship as the property of the owners, earning freight on the outward cargo, and afterwards getting a profit by loading coals. Secondly, the master did that willfully, of his own accord, and with a view to profit. Thirdly, he did these things by effecting partial repairs for the owners' benefit, and he repeated this course of conduct at Calcutta, until he found that the repairs really necessary for a voyage to England were too expensive to be undertaken with the hope of a profitable result. But it was then too late for him to go back; his election had been made, and he could not recall it. Fourthly, he again performed an act of election when he tendered his vessel to the charterers, treating it as the vessel of his owners, and requiring the charterers to perform the contract entered into with his owners. Fifthly, there was not here any act of repudiation by the owners of the act of the master, but up to the last moment there was a real adoption of all that he had done.

[*Hamilton v. Mendez* ⁽⁸⁾, and *Cologan v. The London Assurance Company* ⁽⁹⁾, were also referred to.]

Sir G. Honyman, Q.C., and Mr. Butt, Q.C. (Mr. Lanyon was with them), for the respondents: If this is to be treated as a case where there has been a total loss of the ship, actual or constructive, then no notice of abandonment can be necessary. If no-

⁽¹⁾ 15 Q. B., 649.

⁽²⁾ 1 Macq. Sc. Ap., 328, 334.

⁽³⁾ 1 H. L. C., 513.

⁽⁴⁾ 2 H. L. C., 696.

⁽⁵⁾ 6 Taunt., 68.

⁽⁶⁾ 8 Taunt., 755.

⁽⁷⁾ 4 Bing., 388.

⁽⁸⁾ 2 Burr., 1198; 1 Sir W. B., 276.

⁽⁹⁾ 5 M. & S., 447.

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tice is necessary, then, under the circumstances here, it was given in time.

92] *This is an insurance on freight to be earned on the homeward voyage from Calcutta to London. The undertaking of the underwriter is that the assured shall not be prevented from earning it by any peril happening on the outward voyage. Our argument is that while the ship was at New Zealand, which was in the course of the outward voyage, such an event happened as did prevent this ship from earning freight on the voyage home. The freight here must be taken to be freight to be earned by this particular vessel, and therefore this case is not affected by those in which there were transshipments of goods to other vessels. The only ship that could be tendered to De Mattos under the charterparty was this vessel, the *Sir William Eyre*, which by the terms of the charterparty was to be, when so tendered, "tight, staunch, and strong, and every way fitted for the voyage." If this vessel could not be so tendered, and it could not, then there has been a total loss of the freight, and a loss by the perils insured against. Then was there anything which had happened to this ship that prevented it from being so tendered and earning the freight? No doubt there was. The case itself (par. 24, see *ante*, p. 85) states the fact. But what is there admitted was not known to the assured at the time it occurred. They could have abandoned at that time, but it is not necessary, as a condition precedent to their now recovering, that they should have done so, they being then in ignorance of the real state of the damage done to the ship. There is no question here as to *bond fides* on the part of the master; and the circumstances were such as to justify what he did; he made every effort to pursue the voyage and to earn the chartered freight. He could not succeed, and there has been a total loss of freight. *Moss v. Smith* ⁽¹⁾ and *Rosetto v. Gurney* ⁽²⁾ do not affect the claim made in this case, the circumstances in both being very different from what they are here, and the real question in each case being whether the facts proved could establish a case of total loss. In *Farnworth v. Hyde* ⁽³⁾ the vessel was stranded and in danger of falling to pieces; the cargo was timber (not a perishable article), the master sold it because the 93] expense of forwarding it would have *exceeded its value on arrival. The assured (though no notice of abandonment was ever given) was held entitled to recover as for a total loss.

Whether the ship could earn the freight was a matter which Lord Truro describes as supplying the test of the right of the

(1) 9 C. B., 94; 19 L. J. (C. P.), 225.

(2) 11 C. B., 176; 20 L. J. (C. P.), 257.

(3) 18 C. B. (N. S.), 835; 34 L. J. (C.

P.), 207; on appeal, Law Rep., 2 C. P.

204.

assured to recover. In the *Scottish Insurance Company v. Turner* ⁽¹⁾ he says: "The ship, though so damaged as not to be worth repairing, had yet performed the voyage. To determine whether there has been a loss of freight within the meaning of the policy on freight we must consider what are the obligations which the underwriter takes upon himself by that policy. The underwriter on freight binds himself to indemnify the assured when prevented from performing the voyage insured by any of the perils mentioned in the policy." And, adopting what Mr. Baron Alderson stated to this house in *Benson v. Chapman* ⁽²⁾, His lordship declared that there was no case in which it had ever been held that an action could be maintained against underwriters on freight "where the freight has been actually earned." No doubt that is so; but it is the reverse where it could not be earned because the voyage was lost; and Lord Truro goes on: "Freight may be lost in the sense that, by reason of the perils insured against, the ship has been prevented from earning freight. . . . In that sense the underwriter on freight is liable;" but for any loss of freight after it had been in fact earned, and because the owner was deprived of it by circumstances unconnected with the contract between himself and the underwriter, no action could be maintained. This case is one which comes under the first of these two classes, and the action is maintainable.

If the tender of the vessel at Calcutta to take a cargo to England is relied on as proof that the master then treated the vessel as capable of earning the freight, the answer is, that that was made at a time when the master was entirely ignorant of its real state, when the full survey had not been had, and the extent of the injury the vessel had received had not been ascertained. That injury really was in itself so extensive and so incapable of sufficient repair that De Mattos would not have been bound to accept such a ship under his charterparty, for it was not "tight, staunch, and strong, and every way fitted for the voyage." [94 To bind a charterer to accept a vessel it must be in such a condition that it could at the moment of tender load a cargo, and especially it must be so with words such as those just quoted existing in the charterparty. Here the ship was unfit to carry cargo, and was so by reason of the perils of the sea.

This was admitted by Mr. Justice Willes in the judgment in *Potter v. Campbell* ⁽³⁾, where he said: "We must take it to be the fact that the damage sustained at Bluff Harbor, although the extent of it was not known at the time, was such that the repairs would have exceeded the value. . . . The damage which

⁽¹⁾ 1 Macq. Sc. Ap. 328 334.
⁽²⁾ 5 H. L. C., 721.

⁽³⁾ 16 W. R., 399. Printed papers in the case, 165.

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made it necessary to expend so large a sum of money was mainly attributable to the injury sustained at Bluff Harbor." The insolvency of De Mattos was, therefore, wholly immaterial.

The doctrine for which *Stewart v. Greenock Marine Insurance Company* ⁽¹⁾ and *Benson v. Chapman* ⁽²⁾ were cited is not disputed. No doubt if the assured on ship abandons to the underwriter on ship, the freight in the course of being then earned being an incident to the ship on that voyage, the right to that freight passes to the underwriter on ship. But that principle does not affect the present case. The ship here was not in the course of earning the freight. Here the thing insured was the power to earn the freight of a homeward cargo — a cargo afterwards to be put upon board if the perils of the sea did not prevent it. The ship was irreparably injured by those perils before the cargo that was to give this freight could be put on board. In this case it is sufficient for the assured on freight to make out that the ship had, by the perils of the sea, become unfit to earn the freight. If the particular ship is sold under circumstances which justify the sale, notice of abandonment is not necessary: *Idle v. The Royal Exchange Assurance Company* ⁽³⁾.

Here the circumstances did justify the abandonment of the voyage, and there was no necessity for notice of abandonment. There was, in fact, nothing to abandon: Phillips on Insurance ⁽⁴⁾. 95] *The cases where notice of abandonment is necessary are those where there is something to be given up. But where the ship is so damaged that the master would be justified in selling it at once, notice of abandonment, even to the underwriter on ship, is not necessary. *Knight v. Faith* ⁽⁵⁾ does not in the least degree impeach the right of the assured here, for there the insurance was upon ship, and the ship existed as a ship, there was something to abandon, and it was sold as a ship, and it being held that the master had sold it without justification, it was held that the assured could not recover as for a total loss. Here there was nothing to abandon. There was a total loss of the ship, a loss occasioned by the perils of the sea, and the liability of the insurer on freight, who had insured against the perils of the sea, occasioning the loss of freight, was therefore established.

There is nothing here in the argument as to election. There was no such election as to deprive the assured of the right to recover. It was done in ignorance of the real nature and extent of the injury which the ship had sustained. A man cannot be bound, even by an election expressly made by him, when it

(1) 2 H. L. C., 159.

(2) 2 H. L. C., 696.

(3) 8 Taunt., 755; 3 B. Moo., 115

(4) Sects., 1503, 1649-1650.

(5) 15 Q. B., 649.

is made in ignorance of all the real facts, which, if known, ought to have determined and would have determined his conduct the other way. In the case of money, if money is paid under an honest mistake of fact, or even a real forgetfulness of fact, it may be recovered back: *Kelly v. Solari* ⁽¹⁾; *Townsend v. Crowdy* ⁽²⁾. So in a case of insurance, if a person in ignorance of the real facts of the case performs an act intended honestly for the benefit of all parties concerned, he is not to suffer a loss of his right. In such a case he cannot be said to elect at all. Here the captain did the best for all parties concerned. Had his ship been so little injured that it could well have been repaired at Calcutta, it would have been repaired and would have brought home its cargo. Being found incapable of being repaired, there was no necessity for giving notice of abandonment. But election is not always and necessarily definitive. Where the loss may be partial or may be total, what is called election will not necessarily, in the first instance, be absolutely binding: *Stringer v. The English and Scottish Marine Insurance Company* ⁽³⁾. [96 And that had, in fact, been the substance of the decision in *Fleming v. Smith* ⁽⁴⁾.

Notice was given here, but it has been contended that it was not given in time. No notice was here necessary, and therefore the question of time cannot affect it. But assuming notice to have been necessary, then it was in time. It cannot, of course, be disputed that notice must be given in reasonable time; but what is reasonable time is a question of fact, which must be determined by the particular circumstances of each individual case. Here the facts show that as soon as the state of the vessel was known, the notice of abandonment was given, and the time of knowing the facts is that from which the time for giving notice of abandonment must be calculated. The effect of an abandonment is retrospective: *Arnould on Insurance* ⁽⁵⁾; going back, as *Emerigan* says ⁽⁶⁾, even to the commencement of the risk. But, in fact, no notice was necessary. This was a policy on expected freight, and such a policy does not seem to offer anything upon which an abandonment can operate: *Phill.*, 1503; though where freight has been earned in part it might be different, and there the insurer on freight might be entitled to the benefit of that in account: *Phill.*, 1649, 1650.

There is no objection to the right of the plaintiffs to recover, although this is a policy not on freight in the course of being earned, but on freight intended to be earned at a future time.

⁽¹⁾ 9 M. & W., 54.

⁽⁵⁾ 1 H. L. C., 513.

⁽²⁾ 8 C. B. (N. S.), 477; 29 L. J. (C. P.),

⁽⁶⁾ Vol. ii., pt. 3, c. ix., s. v., p. 1178.

300.

⁽⁴⁾ *Ibid.*, n.

⁽⁷⁾ Law Rep. 4 Q. B., 676.

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Though this insurance may be called the assurance of a possibility of earning freight, a mere chose in action, or even less, still it is an insurable interest: *Foley v. United Fire and Marine Insurance Company* ⁽¹⁾.

Mr. Benjamin replied.

The following questions were put to the judges:

1st. Was there a loss by the perils insured against during the term of the policy?

2d. Was notice of abandonment either of ship or freight, or of 97] *both, necessary to enable the plaintiffs to recover for a total loss on the policy on freight?

3d. If notice of abandonment was necessary, was the notice given in time?

4th. If notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given in time, does the want of due notice as to the ship affect the right of the plaintiffs upon the policy on freight?

5th. Was there any such conduct on the part of the assured after the time of the alleged constructive loss of the ship as discharged the underwriters from their liability upon the policy on freight?

6th. Ought the judgment to be for the appellants or the respondents?

MR. JUSTICE BRETT: My lords, in order to answer your lordships' questions, it seems to me convenient to determine, in the first place, what is the correct interpretation of the policy in respect of which those questions arise, and to point out its peculiarity. What is the subject-matter insured? The description is that the insurance is made "on homeward chartered freight." Having regard to the surrounding circumstances when the policy was made, to these words of reference, and to the case, the policy is not on homeward freight generally, *i. e.* on any homeward freight, but on the homeward chartered freight to be earned under the charterparty of the 9th of February, 1863. It was argued that the subject matter insured was not freight, strictly so called, but some right which the counsel described at different times in different terms. It seems to me that those terms are either other phrases to describe the charterparty freight I have mentioned, or that they do not describe what is the only subject matter insured by this policy. The voyage insured, as descriptive of the voyage during which the perils insured against may arise, is a voyage "at and from the Clyde to Southland, while there, and thence to Otago (New Zealand), and for thirty days, in port there, after arrival." This is a different

⁽¹⁾ Law Rep. 5 C. P., 155.

voyage from, and does not comprise any part of the voyage on which the charterparty freight can be earned, which latter is a *voyage from Calcutta to Liverpool or London. The sub- [98] ject matter insured then is freight; the freight insured is not any, but one particular freight; it is not freight which might be earned on the voyage insured or part of it; the goods in respect of the carriage of which the insured freight may be earned, cannot be at risk during any part of the voyage insured; and therefore the loss of freight covered by this policy cannot occur through damage to goods by a peril insured against, but only through damage to the ship. Assuming then, this to be a valid policy, which is not disputed, the true interpretation of the contract seems to be, that the insurers undertake to indemnify the assured if there should be a loss of the freight to be earned by the charterparty, in consequence of and proximately caused by such injury to the ship from a peril insured against during the voyage from England to New Zealand, as will prevent the assured from being able to earn the whole or any part of the charterparty freight on the voyage from Calcutta to England.

The next matter material to be observed seems to me to be that there is only one contract to which the plaintiff and the defendant are both parties, namely, the policy; and there are only two contracts with which both of them are concerned in this matter, namely, the policy and the charterparty referred to in the policy. The defendant is in no way a party to the policy on ship. He incurs no liability under it and has no rights by virtue of it. It seems therefore contrary to all rule to argue, either as for or against him, from anything depending for its materiality on the existence or non-existence of the policy on ship.

It seems to me convenient, in the next place, to consider what does or does not amount to a loss, and what amounts to a total loss under ordinary policies on freight. On an ordinary policy "on freight" in general terms there is no loss at all on freight for which the underwriter on freight is liable, by reason of partial damage to the ship, however great, causing an average loss on a policy on ship, or of partial damage to cargo, causing an average loss, however great, on the cargo generally under a policy on goods. There is a partial loss of freight under a general policy on freight, if there be a general average loss caused by a peril insured against giving rise to a general average contribution; or under certain circumstances *if there be a [99] total loss of part of a cargo; or if in case of total loss of the ship the cargo be sent on in a substituted ship; or if in case of a total loss of the cargo the ship earns some freight in respect of other goods carried on the voyage insured. There may be

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an actual total loss of freight under a general policy on freight, if there be an actual total loss of ship, or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight. An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured.

It has become a question in this case whether there may not be on a general policy on freight another kind of actual total loss, namely, by such damage to the ship as would justify notice of abandonment, and make thereupon a constructive total loss of ship under a policy on ship, although there be no loss of cargo, or an average loss of cargo without means of sending on the cargo. In such a state of things the ship may or may not be insured; if the ship be insured, due notice of abandonment of ship may or may not have been given. If the ship is not insured, what must happen upon the assumption? The assumption is that a prudent owner will not repair. Then the ship will not be repaired. If not repaired it will remain a wreck or be sold as a wreck. It cannot, therefore, sail on the voyage insured in the policy on freight. Then such freight is and must be in fact absolutely and totally lost. There is no freight, no chance of freight, to abandon to the underwriter on freight. It has never been suggested that the ship should be abandoned to the underwriter on freight. There is nothing then which can be abandoned to him of which he could take possession or from which he could derive profit. If the ship is insured and due notice of abandonment given to the underwriter on ship, the property in the ship passes to the underwriter on ship. In such cases the new owner of the ship will in almost every case sell it as a wreck. Again, there would be nothing and no chance of anything to abandon to the underwriter on [100] freight. If from exceptional facilities the underwriter on ship should repair the ship and earn full freight on the voyage described in the policy on freight, such freight would belong to the new owner of the ship; none of it could go to the assured or underwriter on freight; but freight would have been earned on the voyage insured in the policy on freight, and as the insuring of the ship is the voluntary act of the shipowner, and the abandonment is also his act, it has been decided in your lordships' house that in such exceptional case there is no loss at all of freight for which the underwriter on freight is liable: *Scottish*

Marine Insurance Company v. Turner ⁽¹⁾. If this had not been a decision in your lordships' house, I should have ventured to think that a valid abandonment of ship was of the same effect as leaving it a wreck, and that the real total loss of freight suffered by the assured on freight was covered by the only policy which could cover it, namely, the policy on freight. But the exceptional case thus mentioned, which, according to the decision causes no loss at all of freight on the policy on freight, need not be farther noticed. It is the same case as if the shipowner uninsured on ship, but insured on freight, should unnecessarily and unreasonably repair the ship, sail it on the voyage insured in the freight policy, and earn full freight. In such case it is held that there is no loss at all on the freight policy. If the ship is insured, but due notice of abandonment of the ship has not been given to the underwriter on ship, then the ship is left on the hands of the assured as if it had not been insured. Does not this case become the same as that first put, namely, the case of the shipowner having insured freight but not ship?

It seems impossible to maintain that, upon a question of construction, the rights of either of the assured or underwriter on the freight policy can be altered by anything done or omitted to be done on the policy on ship. To hold otherwise is to mix up two independent contracts, and contracts between different parties. The excepted case above mentioned of the ship being repaired and earning freight on the voyage insured, is made to depend not on what is done under or by virtue of another contract, but on what is done to and by the ship. If the ship earns freight by reason of repairs recklessly or improvidently made, the same result follows whether the ship was insured or [101] not. In determining, then, the construction of the policy on freight as to liabilities and rights under it, it must be immaterial whether the assured on a policy on the ship has lost or made perfect his right to recover on that policy for a constructive total loss of ship, by failing to give, or giving due notice of abandonment under that policy.

The only question is, whether there is any implied contract or condition in the policy on freight, under any of the states of circumstances above mentioned where there is any loss of freight, imposing upon the assured under that policy the obligation of giving notice of abandonment to the underwriter of that policy. And it was to meet this question that the arguments were propounded at the bar with regard to the reason for giving notice of abandonment. On the one side it will be found that the arguments were founded on the assertion that notice of abandonment need not be given where there is nothing

(¹) 1 Macq. Sc. Ap., 328, 334.

to abandon, where there is not anything and no chance of anything which can pass or be of value to the abandonnee. On the other side, the real point of the argument was that if the thing insured could be said to exist in specie, notice of abandonment of it must be given, although it could not pass to the abandonnee, and he could not derive any value from it. This argument took the form of asserting that the notice is required in order to signify an election by the assured, or to give an opportunity for inquiry to the underwriter. The propositions thus enunciated on the two sides were treated by the appellant's counsel as so contradictory the one of the other, so inconsistent, that if the one prevailed the other must fail. It may, however, be that they are consistent, and that where there is anything to abandon, the caution of great merchants and lawyers has, by usage, engrafted upon contracts of marine insurance the implied condition that notice of abandonment must be given, and given quickly, both in order to signify the election of the assured and to give the underwriter opportunity for inquiry and action, but that where there is nothing to abandon notice of abandonment, being futile, is unnecessary. The end to be obtained by abandonment would seem to be the preservation of the cardinal principle of marine insurance, the principle of indemnity and [102] to *that end to prevent the assured from having at the same time payment in full of the sum insured, and the thing insured, a thing of value, in his hands. It may be that it is an incident of the rule, and in order to secure its application, that the assured, where he must abandon in order to recover the sum insured, must give quick notice of his intention to abandon.

But whatever may be the reason of the rule as to the time for giving notice of abandonment, it is, and must be, inapplicable where no abandonment need be made. The question therefore really is, whether there must be abandonment in order to enable an assured to recover as for a total loss when there is nothing to abandon. If there is such a necessity, it arises upon a condition to be implied. It seems to me to be a proposition without foundation of reason to say that there must be an abandonment where there is nothing to abandon. If the case of *Knight v. Faith* ⁽¹⁾ decided the contrary, I, with deference, think it is a wrong decision. The view of the Court of Common Pleas in *Farnworth v. Hyde* ⁽²⁾ not overruled as to this point in the Court of Error, seems to me to be correct. I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required

(1) 15 Q. B., 649.

207; on appeal, Law Repoort, 2 C. P.

(2) 13 C. B. (N.S.), 835; 34 L. J. (C.P.), 204.

where there is nothing to abandon which can pass to or be of value to the underwriter. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorize an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states of circumstances above set forth and considered, the loss of freight on the policy on freight would be an actual total loss. This conclusion does not, as it seems to me, go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such cargo might or *might not be forwarded in a substituted ship, or if the original cargo should be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning substituted freight.

Another form of policy on freight, not unusual, but not so frequent as a policy on freight in general terms, is a policy insuring "chartered freight." In such policies the voyage insured commences usually at or from the port of sailing on the voyage described in the charterparty, or on or at the commencement of the voyage the ship must make to reach that port; but in both cases the voyage insured usually covers also the whole voyage to be sailed under the charterparty. Such a policy attaches earlier than a policy on freight in general terms; it attaches before any goods are on board the ship. If the ship be lost or damaged, or the cargo lost after the goods are on board, the same circumstances must arise and the same considerations apply as have been related and treated of in the case of a policy on freight in general terms. Before any goods are shipped the loss can occur solely by reason of damage to the ship; but if the ship be then actually totally lost, or so damaged as to be possibly a constructive total loss, so much of the above reasoning as is applicable to a loss by damage to the ship seems to be equally if not more cogent to show that no part of the charter freight could possibly be earned by the assured, that there would be no freight or chance of freight to be abandoned, and therefore that no abandonment or notice

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of abandonment would be necessary; but that the loss of the chartered freight would be an actual total loss under the policy on freight.

These considerations, and this inquiry into the rules applicable to ordinary policies on freight, seem to me to determine what must be the decision on this unusual policy on freight under the circumstances which have happened. The questions raised are, whether there is any loss of freight by a peril insured against, and if so, is that loss a total loss? The ship was damaged during the voyage insured; it was damaged by a peril insured against. Unless the damages to the ship should be [104] wholly, or sufficiently, *repaired, the insured freight not be earned. If the damage to the ship could not be sufficiently repaired to enable the assured to earn the charter freight by carrying goods on board that ship, it seems to me that the damage to the ship caused by a peril insured against, during the voyage insured, is the cause of the loss of the earning the chartered freight by that ship. Loss of freight by reason of such damage to the ship caused by such a peril, is a loss against which, according to the interpretation put upon the policy at the commencement of this opinion, the underwriter on this policy on freight has, in terms, agreed to indemnify the assured. The question therefore is, whether the ship could have been sufficiently repaired to enable the assured to earn the chartered freight. Physically or mechanically it could. But as matter of business, carried on according to the dictates of sense, it could not. The true meaning of the 24th paragraph of the case is that a prudent owner of this ship, that is to say, an owner conducting himself according to the dictates of common sense in business, would not repair the ship. In such case the law holds that within the meaning of such a policy as this, the ship could not be repaired so as to earn the freight or any part of it by the use of that ship. The assured not being able to tender that ship, and having none of the goods in his possession, had no claim to carry any goods under the charterparty in a substituted ship.

Without therefore relying upon the other impediment and prevention obviously in the way of the plaintiff's earning the charterparty freight, namely, the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait, it seems to me that the other facts which I have mentioned show conclusively that there was a loss of freight by reason of damage to the ship caused by sea peril, happening during the voyage insured; and that such loss of freight is, upon the construction put upon the policy at the commencement of this

opinion, a loss by a peril insured against; and that inasmuch as without repairing the ship, which the assured did not do, and was not bound to do, because in consideration of law it could not be done, no part of the chartered freight could be earned by any one; and that there was therefore no part of the chartered freight, or any chance of *earning any part of it, [105 which by a pretended abandonment could pass to or be of value to the underwriter on freight; and that consequently the loss of freight was an actual total loss without notice of abandonment.

If notice of abandonment had been necessary, the question whether in this case it was given in due time seems to me to be more doubtful. There was no reason in this case to doubt the accuracy of the information forwarded to the assured. The question therefore, as it seems to me, is whether at any time before the surveys made at Calcutta were received, the assured had information of damage to the ship of such a nature and to such an extent as rendered the prospect of a total loss of the chartered freight imminent but not certain. If he had he was bound to give notice at once. If the case had been on trial before a jury I should say that the jurors should have been asked to find whether at any time there was laid before the assured information so certain and of such a nature as would lead an assured of ordinary care and intelligence to conclude that there was great danger of a total loss of the chartered freight, and only a chance of such loss being obviated, and that they should have been directed that, if such information was at any time conveyed to the assured, he was bound immediately to give notice of abandonment.

As in this case the court was to draw inferences of fact, the question is, whether before the surveys made at Calcutta were received, the assured had information of damage to the ship of such a nature and to such an extent as I have described. The information upon these points which the assured had received were the surveys made at Bluff Harbor and at Port Chalmers. As to the first, made on the 27th of May, 1863, I think it was of no importance. The survey of the 10th of July, 1863, made at Port Chalmers, does seem to me to disclose formidable damage to the ship. If it had stood alone I should have been inclined to think that it disclosed such damage as ought to have so greatly alarmed the assured as that he ought to have acted upon it by giving immediate notice of abandonment. But it seems to me that the surveys of the 25th of August, 1863, and of the 4th of September, 1863, received about the same time, would modify the view to be derived from the former survey, and would lead the assured to *believe that the ship [106

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could proceed to Calcutta, and be repaired to such an extent, and within such a time, as would enable him to earn the chartered freight. I therefore come to the conclusion, though with some doubt, that there was no information before the arrival of the surveys made at Calcutta which made it incumbent on the assured to give notice of abandonment, assuming notice at some time to be necessary, and that, upon the same assumption, the notice given upon the receipt of the Calcutta surveys was given in due time.

If no notice was necessary, if there was an actual total loss, I cannot think that the right of the assured to payment of a total loss can be affected by a delay in demanding such payment. Delay in giving notice of a total loss seems to me to amount to no more than delay in asking for the settlement of it. I know of no obligation in insurance law to give immediate notice of an actual total loss. Immediate notice would not enable the underwriter to make the loss in any way less.

I therefore answer your lordships' questions thus: As to the first, there was a loss by the perils insured against during the term of the policy. As to the second, no notice of abandonment either of ship or freight was necessary. As to the third, if notice of abandonment was necessary, it was given in time. As to the fourth, that in the case supposed, want of due notice as to the ship would not affect the rights of the plaintiffs upon the policy on freight. As to the fifth, there was no such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight. As to the sixth, that the judgment ought to be for the respondents.

MR. JUSTICE MELLOR: My lords, I answer all the questions proposed by your lordships to the judges who attended during the argument in this case in favor of the plaintiffs below, the respondents in your lordships' house.

In answer to the first question, I am of opinion that there was a loss of the subject matter of insurance by the perils insured against during the term of the policy.

In answer to the second question, I am of opinion that no notice ^{107]} of abandonment either of the ship or freight was necessary under the circumstances to enable the plaintiffs to recover for a total loss on the policy on freight.

In answer to the third question, I am of opinion, although with some hesitation, that if notice of abandonment was necessary, it was under the circumstances given in time.

To the fourth question, I answer that in my opinion if notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given

in time, the want of due notice as to the ship does not affect the right of the plaintiffs upon the policy on freight.

To the fifth question, I answer that in my opinion there was no such conduct on the part of the assured, after the time of the alleged constructive loss of the ship, as discharged the underwriters from their liability upon the policy on freight.

To the sixth question, I am of opinion that the judgment ought to be for the respondents.

In order to arrive at a right conclusion in this case, it is most essential accurately to ascertain the subject matter insured by the policy in question, and against what perils it was agreed by the underwriters to insure; and to keep absolutely distinct the considerations which alone affect the policy on the contemplated homeward freight from those considerations which would apply to an ordinary case of insurance of the ship; and I cannot help saying with great respect, that the error into which the Court of Common Pleas appears to me to have fallen has arisen from not keeping distinct the character of the plaintiffs as owners of the ship from their character as insurers of an entirely distinct subject matter of insurance, viz., the freight contemplated to be earned on the homeward voyage. [The learned judge stated its provisions and those of the policy.]

The subject insured by the policy was assumed and treated in the argument at the bar to be a valued sum of £4000 on homeward chartered freight valued at £5000, although the latter figure is not filled in the policy. It is to be observed that the nature of the interest insured is not an interest in anything actually existing and of which possession can be had, such as a ship or cargo, or freight of cargo on board, but it is the interest only in the right *to have a cargo provided by the charterer at Calcutta on the condition that the ship, when it arrived there, should be tight, staunch, and strong, and every way fitted for the voyage home, notwithstanding any perils of seas which might happen to the ship on the voyage to New Zealand, and for thirty days in port there after arrival. In other words, it is a warranty that no "peril of the seas" which might happen to the ship on the voyage to New Zealand, and for thirty days in port there after arrival, should prevent the ship from arriving at Calcutta, and from being there tight, staunch, and strong, and every way fitted for the voyage home, with the cargo there stipulated to be loaded by the agent of the charterer; and the right to have such cargo loaded, and to earn the stipulated freight on the voyage home, and the interest in such right, is by the policy valued at the sum of £4000. The question really is, was the ship so damaged by perils of the seas during the period covered by that policy as to be practically disabled from arriv-

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ing and being at Calcutta in such condition of seaworthiness as to entitle the owner to require from the charterers' agent the loading of the stipulated cargo?

In the judgment of the Court of Common Pleas it is said that "the case of insurance of specific charter freight to be carried upon a future voyage against perils to be incurred in the present one, is, so far as we can learn, exceptional in practice, though not unprecedented." And I cannot forbear to add that I think it to be an eminently inconvenient and unsatisfactory course of insurance. The subject matter of the insurance under the policy in question appears to me to be accurately appreciated and stated by the Court of Common Pleas (¹), but I think that the foundation of the error into which, as it appears to me, the court fell, is to be found in the following passage of the judgment: "The insurance of a subject thus dependent upon the possession of the ship, though not properly an accessory thereto, nor incident to the voyage insured, yet being insured by the ordinary form of policy, ought to be dealt with upon the same principles as an insurance of the ship itself, and as subject to the same conditions in respect of abandonment and otherwise, unless so far as the character of the subject matter rendered abandonment idle or inapplicable." *I have already stated that in my opinion the true effect of the policy under consideration was to insure the ability of the ship to earn the freight contemplated by the charterparty, upon the cargo to be loaded at Calcutta for the homeward voyage, against perils to be encountered by the ship on the voyage to New Zealand, and for thirty days in port there after arrival, so that the ship should not be prevented from getting to Calcutta in such a state of seaworthiness as to give the owners a right of action against De Mattos, if he did not load the cargo pursuant to the charterparty.

The condition of the ship when at New Zealand, as regarded the sea damage which it sustained there during the time covered by the policy, was such, as it is admitted, would have justified an abandonment and claim for a constructive total loss. That being so, it now becomes important to consider whether the right to earn the freight under the charterparty was, and to what extent, affected by the actual condition of the ship at New Zealand. Baron Cleasby is reported to have said in the Court of Exchequer Chamber (²), that the thing insured "is the right to earn the freight, and this is neither destroyed nor irretrievably lost because the ship is damaged to the extent alleged. The condition of earning it, namely, repairing the vessel, is not made impossible, but expensive, and therefore difficult of performance,

(¹) Law Rep., 8 C. P., 567-8.

(²) Law Rep., 5 C. P., 356.

but these expenses and the difficulty form the equivalent in such case to damage to the thing, where the thing exists in specie, and mere damage to any extent does not constitute total loss." With great respect this appears to me to confound the considerations which arise upon two distinct contracts, viz., that of an ordinary policy on the ship, and a policy confined to the right and ability of the ship to earn the stipulated freight. The ship was, in fact, in such condition at New Zealand from sea damage, that no uninsured owner of ordinary prudence would have repaired it, and so far as he was concerned, had he known the actual facts, he would have been justified in at once abandoning it to the underwriters.

So soon as the ship became so sea damaged that no prudent uninsured owner would repair it, I think that from that moment its capacity to earn the stipulated freight on the homeward voyage had become a practical impossibility, so that it could not be *effectually tendered to the agent of the freighter at Cal- [110 cutta as a ship "tight, staunch, and strong, and everyway fitted for the voyage," that is the homeward voyage. It must be taken for granted that if the actual extent of the damage had been ascertained at New Zealand, the owner would then have done what he did at Calcutta, namely, abandon the ship to the underwriters; but the doing that, or the not doing it, either at New Zealand or Calcutta, could not, and does not, as I think, assist in determining whether, in fact, by reason of perils of seas during the time covered by the policy, the ship had become incapable of earning the contemplated freight, pursuant to the charter-party. I accept the dilemma proposed in the judgment of the Court of Common Pleas (¹), that "the assured must answer that the total loss was complete, actual, and absolute, without abandonment at Bluff Harbor, immediately upon the happening of the damage, to repair which, would cost more than the value of the vessel, and if that were so, the subsequent proceedings of the owner were immaterial, inasmuch as no freight, properly so called, was in fact subsequently earned."

I think that my Brother Lush was right in the opinion he expressed in the Court of Exchequer Chamber (²), namely, "That which in the language of maritime commerce constitutes a loss of a ship, is damage to an extent which renders the ship not worth repairing, followed by a determination not to repair. As respects her capacity to earn freight, a ship in such condition is as much lost to the owner as if it had sunk or broken up."

It is true that the ship was taken to Calcutta under the charter-party as an existing ship, such as was supposed capable of being

(¹) Law Rep., 3 C. P., 568

(²) Law Rep., 5 C. P., 376.

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repaired at a cost which might reasonably be incurred in order to enable it to prosecute the homeward voyage. But when the true condition of the ship was ascertained, and it was found to be damaged to an extent which justified the owners in abandoning it to the underwriters, as a constructive total loss, and they did abandon it, the inference arising from those facts is entirely rebutted. I do not feel it incumbent on me to do more than to say, that whatever was then done or omitted to be done with a view to abandonment by the plaintiffs as owners of the ship, [111] *has no real bearing upon the question to be determined in this case. If I am right in assuming that by reason of damage from perils of the sea, the ship had within the time covered by the policy become practically disabled from being tendered at Calcutta to the freighters' agent, as a ship answering the conditions of the charterparty, the subject-matter of insurance had become a total loss. There is nothing which the owners as the assured of the anticipated freight could do, or leave undone, which could affect the position or conduct of the underwriters in regard to the contract contained in the policy on freight.

To say that the plaintiffs as the assured of the freight were in fact identified with the owners of the ship, and were therefore bound to act, or not to act, to elect, or not to elect, in conformity with the proceedings of the plaintiffs as owners of the ship, is to confound the rights and obligations of the parties under two separate and distinct contracts. It does not appear from the case whether there was an insurance on the ship, though I collect from the judgment in *Potter v. Campbell* ⁽¹⁾, that there was such a policy on the ship covering the voyage to New Zealand; but I am entitled, in considering the effect of the policy in question, to treat the ship as uninsured, and to deal singly with the loss of the anticipated freight. The right to call upon De Mattos to load a cargo at Calcutta had been rendered abortive by the perils of the seas, resulting in such damage to the ship at New Zealand as rendered it practically impossible to make an effectual tender of the ship to receive cargo at Calcutta. What was then in the power of the assured under this policy to do or say to the underwriters which would not have been an idle ceremony?

The plaintiffs in their character of owners of the ship had a duty to elect and give to the insurers on ship notice of abandonment within a reasonable time after the discovery of the true state of the facts, and it may be that they were guilty of such laches in delay in the discovery as rendered their notice of abandonment when given inoperative; but I am at a loss to see how.

(1) 16 W. R., 399. Printed papers in the case, 165.

that affects them under the policy in question. Their election was made for them when the condition of the ship, owing to perils insured against, became such as practically destroyed its capacity *to earn the contemplated freight. The ground [112 upon which a notice of abandonment is held not to be necessary, where a ship founders at sea, and an actual total loss takes place, is, that there is nothing left which the assured can cede to the underwriters, or by which their position can be affected, and it appears to me that the reasoning of Lord Abinger, in delivering the judgment of the Exchequer Chamber in *Roux v. Salvador* ⁽¹⁾, applies strictly to the circumstances of the present case. Had it not been for the respect which I feel for the opinions of the judges, who, expressing the same view which I entertain of the subject-matter of insurance under the policy in question, have come to a different conclusion, I should have been content to state my opinion to be in conformity with the judgments of the Lord Chief Justice Cockburn and my brother Lush in the Court of Exchequer Chamber.

Entertaining a very strong opinion that no notice of abandonment was necessary, I feel some difficulty in dealing with the question whether if a notice of abandonment was necessary it was given in time. In considering this question as applicable to the policy on freight simply, it appears to me that questions of fact quite distinct from those which would affect the policy on the ship may arise, and it may well be that what is a reasonable notice in the one case is not reasonable in the other; but I cannot fix any precise time, under the circumstances of the present case, from which, if a notice was necessary to be given, it would be or not be in time, as a matter of reasonableness. If it is to depend upon the diligence with which the owner pursues the inquiry into the actual condition of the ship arising from sea peril, I do not discover in the facts stated any such laches or neglect, or any such conduct on the part of the master in his dealing with the ship until the extent of the damage was fully discovered, as would induce me to differ from the opinion expressed by the majority of the judges in the Exchequer Chamber.

Before concluding, I ought not to omit to notice a point that was made in the argument, and which I believe is adopted by one of my learned brothers for whose opinion I entertain the greatest respect, namely, that the insolvency of De Mattos, and not the perils of the seas, was the proximate cause of the loss of the *anticipated freight, and farther, that the de- [113 lay in the ship's arrival at Calcutta had discharged De Mattos, even if solvent, from loading a cargo under the terms of the

(1) 3 Bing. N. C., 278.

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charterparty. I cannot help thinking that this view of the case arises from not keeping strictly in mind the subject matter of insurance under the policy. If the matter insured was the right and ability of the ship to earn the homefreight by being at Calcutta, tight, staunch, and strong, and everyway fitted for the voyage home, and that such state of the ship was a condition precedent to the right to require the loading of a cargo at Calcutta by the agent of De Mattos, the ship neither did nor could fulfill that condition, owing to the perils of the seas during the time covered by the policy, and that I think was a loss insured against independently of the solvency or insolvency of De Mattos.

It was farther said that the fact of the insolvency of De Mattos would have equally prevented his agent from providing a cargo, even if the ship had arrived at Calcutta in seaworthy condition. Had the policy not been a valued policy, that fact might have seriously affected the damages, but I do not see how it can afford an answer to the present action.

Then with regard to De Mattos being discharged from the obligation to load a cargo in consequence of the delay which had taken place in the arrival of the ship, that can be no answer to the action, if I am right in attributing that delay to the effect of sea damage within the policy.

I have therefore come to the conclusion that all the questions propounded by your lordships to the judges ought to be answered in favor of the plaintiffs below who are the respondents in your lordships' house.

MR. JUSTICE BLACKBURN: My lords, your lordships have in this case proposed six questions to the judges, all of which I answer in favor of the plaintiffs in the cause, who are the respondents in your lordships' house. With your lordships' permission I will first state generally my reasons for deciding in favor of the plaintiffs on the merits. [The learned judge here gave a summary of the charterparty and policy.]

It is to be observed on this charterparty that it is a condition [114] *precedent to the earning of the freight that the Sir William Eyre should be, in due time, at Calcutta, and there seaworthy for the voyage from Calcutta to Liverpool or London. The plaintiffs could not substitute any other vessel for it, and that being so, the plaintiffs might be prevented from earning that freight by any disaster which befell this particular ship on its voyage out to New Zealand, or during its stay there, or on the voyage thence to Calcutta, or during its stay there, if the effect of that disaster was to render it impracticable to tender the ship at Calcutta in due time, and in a seaworthy condition for the voyage home round the Cape of Good Hope; but that they had

a vested expectation of earning this freight, if no such disaster happened. They had therefore in respect of this freight an insurable interest during the whole of the outward voyage. This is not, as I understand, disputed; but if authority is required for it, I would refer your lordships to *Barber v. Fleming* ⁽¹⁾ and *Foley v. United Marine Insurance Company* ⁽²⁾. Being so situated they entered into the policy. In my opinion, the whole merits in this case depend upon the accurate understanding of the contract contained in this policy.

I must first observe on a matter which is perhaps not strictly before your lordships. It is stated that this insurance was for £4000 on freight valued at £5000, and throughout the argument, and in the judgments below, the policy was treated as a valued policy, and consequently no question was discussed as to the amount to be recovered, nor whether the insolvency of De Mattos, and the consequent diminution in value of the freight insured, affected that amount. In the policy itself, however, the space which, if this was the case, ought to have been filled up with £5000, is left blank, and the policy is in form an open one. It is possible that the policy is miscopied, but I think it more probable that it was drawn up in this form by mistake, and that the underwriters, either from a sense of honor or from knowing that the contract could be reformed in equity, have been content to act on the contract as it ought to have been drawn up. I presume your lordships would not like to put any obstacle in the way of such a fair proceeding. I shall therefore make no farther remark on the amount to be recovered.

*The insurance is "lost or not lost at and from Clyde to [115 Southland, while there, and thence to Otago, New Zealand, and for thirty days in port there," upon the *Sir William Eyre*. And the subject matter is £4,000 on homeward chartered freight. I think that the meaning of this contract is that the underwriters are to indemnify the assured if by any of the perils insured against the *Sir William Eyre* is, during the voyage from the Clyde to New Zealand, or during thirty days after arrival there, so damaged that, in consequence thereof, the homeward chartered freight cannot be earned.

In the judgment in the Common Pleas in this case ⁽³⁾ it is said, "The policy under consideration thus differs from an ordinary insurance upon freight. First, in that it could not be affected by loss of cargo, because the freight insured was not for cargo in existence or appropriated during the risk; next, that it was not subject to general average either of ship or cargo, because the freight was not to be earned during the voyage in-

⁽¹⁾ Law Rep., 5 Q. B., 59.

⁽²⁾ Law Rep., 5 C. P., 155.

⁽³⁾ Law Rep., 3 C. P., 567.

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could proceed to Calcutta, and be repaired to such an extent, and within such a time, as would enable him to earn the chartered freight. I therefore come to the conclusion, though with some doubt, that there was no information before the arrival of the surveys made at Calcutta which made it incumbent on the assured to give notice of abandonment, assuming notice at some time to be necessary, and that, upon the same assumption, the notice given upon the receipt of the Calcutta surveys was given in due time.

If no notice was necessary, if there was an actual total loss, I cannot think that the right of the assured to payment of a total loss can be affected by a delay in demanding such payment. Delay in giving notice of a total loss seems to me to amount to no more than delay in asking for the settlement of it. I know of no obligation in insurance law to give immediate notice of an actual total loss. Immediate notice would not enable the underwriter to make the loss in any way less.

I therefore answer your lordships' questions thus: As to the first, there was a loss by the perils insured against during the term of the policy. As to the second, no notice of abandonment either of ship or freight was necessary. As to the third, if notice of abandonment was necessary, it was given in time. As to the fourth, that in the case supposed, want of due notice as to the ship would not affect the rights of the plaintiffs upon the policy on freight. As to the fifth, there was no such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight. As to the sixth, that the judgment ought to be for the respondents.

MR. JUSTICE MELLOR: My lords, I answer all the questions proposed by your lordships to the judges who attended during the argument in this case in favor of the plaintiffs below, the respondents in your lordships' house.

In answer to the first question, I am of opinion that there was a loss of the subject matter of insurance by the perils insured against during the term of the policy.

In answer to the second question, I am of opinion that no notice
107] of abandonment either of the ship or freight was necessary under the circumstances to enable the plaintiffs to recover for a total loss on the policy on freight.

In answer to the third question, I am of opinion, although with some hesitation, that if notice of abandonment was necessary, it was under the circumstances given in time.

To the fourth question, I answer that in my opinion if notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given

in time, the want of due notice as to the ship does not affect the right of the plaintiffs upon the policy on freight.

To the fifth question, I answer that in my opinion there was no such conduct on the part of the assured, after the time of the alleged constructive loss of the ship, as discharged the underwriters from their liability upon the policy on freight.

To the sixth question, I am of opinion that the judgment ought to be for the respondents.

In order to arrive at a right conclusion in this case, it is most essential accurately to ascertain the subject matter insured by the policy in question, and against what perils it was agreed by the underwriters to insure; and to keep absolutely distinct the considerations which alone affect the policy on the contemplated homeward freight from those considerations which would apply to an ordinary case of insurance of the ship; and I cannot help saying with great respect, that the error into which the Court of Common Pleas appears to me to have fallen has arisen from not keeping distinct the character of the plaintiffs as owners of the ship from their character as insurers of an entirely distinct subject matter of insurance, viz., the freight contemplated to be earned on the homeward voyage. [The learned judge stated its provisions and those of the policy.]

The subject insured by the policy was assumed and treated in the argument at the bar to be a valued sum of £4000 on homeward chartered freight valued at £5000, although the latter figure is not filled in the policy. It is to be observed that the nature of the interest insured is not an interest in anything actually existing and of which possession can be had, such as a ship or cargo, or freight of cargo on board, but it is the interest only in the right to have a cargo provided by the charterer at Calcutta on the condition that the ship, when it arrived there, should be tight, staunch, and strong, and every way fitted for the voyage home, notwithstanding any perils of seas which might happen to the ship on the voyage to New Zealand, and for thirty days in port there after arrival. In other words, it is a warranty that no "peril of the seas" which might happen to the ship on the voyage to New Zealand, and for thirty days in port there after arrival, should prevent the ship from arriving at Calcutta, and from being there tight, staunch, and strong, and every way fitted for the voyage home, with the cargo there stipulated to be loaded by the agent of the charterer; and the right to have such cargo loaded, and to earn the stipulated freight on the voyage home, and the interest in such right, is by the policy valued at the sum of £4000. The question really is, was the ship so damaged by perils of the seas during the period covered by that policy as to be practically disabled from arriv-

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ing and being at Calcutta in such condition of seaworthiness as to entitle the owner to require from the charterers' agent the loading of the stipulated cargo?

In the judgment of the Court of Common Pleas it is said that "the case of insurance of specific charter freight to be carried upon a future voyage against perils to be incurred in the present one, is, so far as we can learn, exceptional in practice, though not unprecedented." And I cannot forbear to add that I think it to be an eminently inconvenient and unsatisfactory course of insurance. The subject matter of the insurance under the policy in question appears to me to be accurately appreciated and stated by the Court of Common Pleas (¹), but I think that the foundation of the error into which, as it appears to me, the court fell, is to be found in the following passage of the judgment: "The insurance of a subject thus dependent upon the possession of the ship, though not properly an accessory thereto, nor incident to the voyage insured, yet being insured by the ordinary form of policy, ought to be dealt with upon the same principles as an insurance of the ship itself, and as subject to the same conditions in respect of abandonment and otherwise, unless so far as the character of the subject matter rendered abandonment idle or inapplicable." *I have already stated that in my opinion the true effect of the policy under consideration was to insure the ability of the ship to earn the freight contemplated by the charterparty, upon the cargo to be loaded at Calcutta for the homeward voyage, against perils to be encountered by the ship on the voyage to New Zealand, and for thirty days in port there after arrival, so that the ship should not be prevented from getting to Calcutta in such a state of seaworthiness as to give the owners a right of action against De Mattos, if he did not load the cargo pursuant to the charterparty.

The condition of the ship when at New Zealand, as regarded the sea damage which it sustained there during the time covered by the policy, was such, as it is admitted, would have justified an abandonment and claim for a constructive total loss. That being so, it now becomes important to consider whether the right to earn the freight under the charterparty was, and to what extent, affected by the actual condition of the ship at New Zealand. Baron Cleasby is reported to have said in the Court of Exchequer Chamber (²), that the thing insured "is the right to earn the freight, and this is neither destroyed nor irretrievably lost because the ship is damaged to the extent alleged. The condition of earning it, namely, repairing the vessel, is not made impossible, but expensive, and therefore difficult of performance,

(¹) Law Rep., 8 C. P., 567-8.

(²) Law Rep., 5 C. P., 356.

but these expenses and the difficulty form the equivalent in such case to damage to the thing, where the thing exists in specie, and mere damage to any extent does not constitute total loss." With great respect this appears to me to confound the considerations which arise upon two distinct contracts, viz., that of an ordinary policy on the ship, and a policy confined to the right and ability of the ship to earn the stipulated freight. The ship was, in fact, in such condition at New Zealand from sea damage, that no uninsured owner of ordinary prudence would have repaired it, and so far as he was concerned, had he known the actual facts, he would have been justified in at once abandoning it to the underwriters.

So soon as the ship became so sea damaged that no prudent uninsured owner would repair it, I think that from that moment its capacity to earn the stipulated freight on the homeward voyage had become a practical impossibility, so that it could not be *effectually tendered to the agent of the freighter at Cal- [110 cutta as a ship "tight, staunch, and strong, and every way fitted for the voyage," that is the homeward voyage. It must be taken for granted that if the actual extent of the damage had been ascertained at New Zealand, the owner would then have done what he did at Calcutta, namely, abandon the ship to the underwriters; but the doing that, or the not doing it, either at New Zealand or Calcutta, could not, and does not, as I think, assist in determining whether, in fact, by reason of perils of seas during the time covered by the policy, the ship had become incapable of earning the contemplated freight, pursuant to the charter-party. I accept the dilemma proposed in the judgment of the Court of Common Pleas (¹), that "the assured must answer that the total loss was complete, actual, and absolute, without abandonment at Bluff Harbor, immediately upon the happening of the damage, to repair which, would cost more than the value of the vessel, and if that were so, the subsequent proceedings of the owner were immaterial, inasmuch as no freight, properly so called, was in fact subsequently earned."

I think that my Brother Lush was right in the opinion he expressed in the Court of Exchequer Chamber (²), namely, "That which in the language of maritime commerce constitutes a loss of a ship, is damage to an extent which renders the ship not worth repairing, followed by a determination not to repair. As respects her capacity to earn freight, a ship in such condition is as much lost to the owner as if it had sunk or broken up."

It is true that the ship was taken to Calcutta under the charter-party as an existing ship, such as was supposed capable of being

(¹) Law Rep., 3 C. P., 568

(²) Law Rep., 5 C. P., 876.

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repaired at a cost which might reasonably be incurred in order to enable it to prosecute the homeward voyage. But when the true condition of the ship was ascertained, and it was found to be damaged to an extent which justified the owners in abandoning it to the underwriters, as a constructive total loss, and they did abandon it, the inference arising from those facts is entirely rebutted. I do not feel it incumbent on me to do more than to say, that whatever was then done or omitted to be done with a view to abandonment by the plaintiffs as owners of the ship, [111] *has no real bearing upon the question to be determined in this case. If I am right in assuming that by reason of damage from perils of the sea, the ship had within the time covered by the policy become practically disabled from being tendered at Calcutta to the freighters' agent, as a ship answering the conditions of the charterparty, the subject-matter of insurance had become a total loss. There is nothing which the owners as the assured of the anticipated freight could do, or leave undone, which could affect the position or conduct of the underwriters in regard to the contract contained in the policy on freight.

To say that the plaintiffs as the assured of the freight were in fact identified with the owners of the ship, and were therefore bound to act, or not to act, to elect, or not to elect, in conformity with the proceedings of the plaintiffs as owners of the ship, is to confound the rights and obligations of the parties under two separate and distinct contracts. It does not appear from the case whether there was an insurance on the ship, though I collect from the judgment in *Potter v. Campbell* (*), that there was such a policy on the ship covering the voyage to New Zealand; but I am entitled, in considering the effect of the policy in question, to treat the ship as uninsured, and to deal singly with the loss of the anticipated freight. The right to call upon De Mattos to load a cargo at Calcutta had been rendered abortive by the perils of the seas, resulting in such damage to the ship at New Zealand as rendered it practically impossible to make an effectual tender of the ship to receive cargo at Calcutta. What was then in the power of the assured under this policy to do or say to the underwriters which would not have been an idle ceremony?

The plaintiffs in their character of owners of the ship had a duty to elect and give to the insurers on ship notice of abandonment within a reasonable time after the discovery of the true state of the facts, and it may be that they were guilty of such laches in delay in the discovery as rendered their notice of abandonment when given inoperative; but I am at a loss to see how

(*) 16 W. R., 399. Printed papers in the case, 165.

that affects them under the policy in question. Their election was made for them when the condition of the ship, owing to perils insured against, became such as practically destroyed its capacity *to earn the contemplated freight. The ground [112 upon which a notice of abandonment is held not to be necessary, where a ship founders at sea, and an actual total loss takes place, is, that there is nothing left which the assured can cede to the underwriters, or by which their position can be affected, and it appears to me that the reasoning of Lord Abinger, in delivering the judgment of the Exchequer Chamber in *Roux v. Salvador* ⁽¹⁾, applies strictly to the circumstances of the present case. Had it not been for the respect which I feel for the opinions of the judges, who, expressing the same view which I entertain of the subject-matter of insurance under the policy in question, have come to a different conclusion, I should have been content to state my opinion to be in conformity with the judgments of the Lord Chief Justice Cockburn and my brother Lush in the Court of Exchequer Chamber.

Entertaining a very strong opinion that no notice of abandonment was necessary, I feel some difficulty in dealing with the question whether if a notice of abandonment was necessary it was given in time. In considering this question as applicable to the policy on freight simply, it appears to me that questions of fact quite distinct from those which would affect the policy on the ship may arise, and it may well be that what is a reasonable notice in the one case is not reasonable in the other; but I cannot fix any precise time, under the circumstances of the present case, from which, if a notice was necessary to be given, it would be or not be in time, as a matter of reasonableness. If it is to depend upon the diligence with which the owner pursues the inquiry into the actual condition of the ship arising from sea peril, I do not discover in the facts stated any such laches or neglect, or any such conduct on the part of the master in his dealing with the ship until the extent of the damage was fully discovered, as would induce me to differ from the opinion expressed by the majority of the judges in the Exchequer Chamber.

Before concluding, I ought not to omit to notice a point that was made in the argument, and which I believe is adopted by one of my learned brothers for whose opinion I entertain the greatest respect, namely, that the insolvency of De Mattos, and not the perils of the seas, was the proximate cause of the loss of the *anticipated freight, and farther, that the de- [113 lay in the ship's arrival at Calcutta had discharged De Mattos, even if solvent, from loading a cargo under the terms of the

(1) 8 Bing. N. C., 278.

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charterparty. I cannot help thinking that this view of the case arises from not keeping strictly in mind the subject matter of insurance under the policy. If the matter insured was the right and ability of the ship to earn the homefreight by being at Calcutta, tight, staunch, and strong, and everyway fitted for the voyage home, and that such state of the ship was a condition precedent to the right to require the loading of a cargo at Calcutta by the agent of De Mattos, the ship neither did nor could fulfill that condition, owing to the perils of the seas during the time covered by the policy, and that I think was a loss insured against independently of the solvency or insolvency of De Mattos.

It was farther said that the fact of the insolvency of De Mattos would have equally prevented his agent from providing a cargo, even if the ship had arrived at Calcutta in seaworthy condition. Had the policy not been a valued policy, that fact might have seriously affected the damages, but I do not see how it can afford an answer to the present action.

Then with regard to De Mattos being discharged from the obligation to load a cargo in consequence of the delay which had taken place in the arrival of the ship, that can be no answer to the action, if I am right in attributing that delay to the effect of sea damage within the policy.

I have therefore come to the conclusion that all the questions propounded by your lordships to the judges ought to be answered in favor of the plaintiffs below who are the respondents in your lordships' house.

MR. JUSTICE BLACKBURN: My lords, your lordships have in this case proposed six questions to the judges, all of which I answer in favor of the plaintiffs in the cause, who are the respondents in your lordships' house. With your lordships' permission I will first state generally my reasons for deciding in favor of the plaintiffs on the merits. [The learned judge here gave a summary of the charterparty and policy.]

It is to be observed on this charterparty that it is a condition [14] *precedent to the earning of the freight that the Sir William Eyre should be, in due time, at Calcutta, and there seaworthy for the voyage from Calcutta to Liverpool or London. The plaintiffs could not substitute any other vessel for it, and that being so, the plaintiffs might be prevented from earning that freight by any disaster which befell this particular ship on its voyage out to New Zealand, or during its stay there, or on the voyage thence to Calcutta, or during its stay there, if the effect of that disaster was to render it impracticable to tender the ship at Calcutta in due time, and in a seaworthy condition for the voyage home round the Cape of Good Hope; but that they had

a vested expectation of earning this freight, if no such disaster happened. They had therefore in respect of this freight an insurable interest during the whole of the outward voyage. This is not, as I understand, disputed; but if authority is required for it, I would refer your lordships to *Barber v. Fleming* ⁽¹⁾ and *Foley v. United Marine Insurance Company* ⁽²⁾. Being so situated they entered into the policy. In my opinion, the whole merits in this case depend upon the accurate understanding of the contract contained in this policy.

I must first observe on a matter which is perhaps not strictly before your lordships. It is stated that this insurance was for £4000 on freight valued at £5000, and throughout the argument, and in the judgments below, the policy was treated as a valued policy, and consequently no question was discussed as to the amount to be recovered, nor whether the insolvency of De Mattos, and the consequent diminution in value of the freight insured, affected that amount. In the policy itself, however, the space which, if this was the case, ought to have been filled up with £5000, is left blank, and the policy is in form an open one. It is possible that the policy is miscopied, but I think it more probable that it was drawn up in this form by mistake, and that the underwriters, either from a sense of honor or from knowing that the contract could be reformed in equity, have been content to act on the contract as it ought to have been drawn up. I presume your lordships would not like to put any obstacle in the way of such a fair proceeding. I shall therefore make no farther remark on the amount to be recovered.

*The insurance is "lost or not lost at and from Clyde to [115 Southland, while there, and thence to Otago, New Zealand, and for thirty days in port there," upon the Sir William Eyre. And the subject matter is £4,000 on homeward chartered freight. I think that the meaning of this contract is that the underwriters are to indemnify the assured if by any of the perils insured against the Sir William Eyre is, during the voyage from the Clyde to New Zealand, or during thirty days after arrival there, so damaged that, in consequence thereof, the homeward chartered freight cannot be earned.

In the judgment in the Common Pleas in this case ⁽³⁾ it is said, "The policy under consideration thus differs from an ordinary insurance upon freight. First, in that it could not be affected by loss of cargo, because the freight insured was not for cargo in existence or appropriated during the risk; next, that it was not subject to general average either of ship or cargo, because the freight was not to be earned during the voyage in-

⁽¹⁾ Law Rep., 5 Q. B., 59.

⁽²⁾ Law Rep., 3 C. P., 567.

⁽³⁾ Law Rep., 5 C. P., 155.

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sured, and, as a consequence, that the underwriter was not in any case to contribute to repairs of the ship, not even in respect of general average. And lastly, that as the freight rested in contract for the future employment of the ship only, it would not pass by bare abandonment to the underwriters upon ship, but would simply come to nothing upon such abandonment if justifiable, because the abandonment would be in effect an election by the owner to treat the charter as at an end by reason of the usual exception of sea perils in the charterparty, and he would not be bound to incur in favor of the underwriters on ship any new responsibility not connected with the voyage on which the ship was insured." So far I completely agree, and instead of repeating this in other words I adopt this language as my own, but in what follows in that judgment I do not agree.

I think that if there was damage to the ship, such that though it was physically possible to repair the ship, the expense would be so great that, according to the rule laid down in *Moss v. Smith* ⁽¹⁾, it was unreasonable so to do; the owner might, as between him and the charterer, elect not to repair the ship, but to treat the charter as at an end by reason of the exception of the sea perils, and if, under such circumstances, the owner did not in 116] fact repair, *the freight was totally lost by the perils insured against, and not, as stated in the judgment in the Common Pleas, by the owner's default, for the owner was not bound to repair the ship. There would be no loss from the perils insured against, if the owner did in fact repair the ship, which, though not bound to do so, he had a right to do if he pleased.

If, indeed, there had been a partial loss or damage, such that the owner could reasonably repair the ship, he was bound to do so; and if in such a case he declined to do so, I should agree with the judgment in the Common Pleas, in saying that he would lose the freight by his own choice or default, and not by any peril insured against. But I think that where the damage is so great that the owner is not bound to repair the ship, if he declines to do so he would lose his freight, not by his own default, but by the perils insured against. This seems an elementary proposition, but as much of what I consider the error in the judgment of the Common Pleas arises from not bearing it in mind, I will proceed to state some authorities for it.

The principle is thus expressed in the judgment of the Queen's Bench in *Stringer v. English &c., Insurance Company* ⁽²⁾: "The assured if he, by any means such as he could reasonable be expected to use, could have prevented the loss" (which was in that case by a sale in the prize court) "was bound to use them,

(1) 9 C. B., 104; 19 L. J. (C. P.), 225.

(2) Law Rep., 4 Q. B., 601.

and if the sale was directly occasioned by his default, though remotely by the perils insured against" (in that case a seizure) "he cannot recover against the underwriters. But the assured are not bound to use unreasonable exertions in order to preserve the thing insured; and if the giving of a bond or deposit of money" (in the present case the repairing of the ship) "would have exposed them to expense or risk of expense beyond the value of the object, or, as the same idea is often expressed, if the steps necessary to prevent the sale" (loss) "were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure."

I do not cite this as conclusive, for it is for your lordships to determine whether it is correct or not, but as expressing what I think the true principle. So far as regards the case of a ship, it is *very concisely and I think accurately expressed by [117 the words of my brother Lush, as already quoted from his judgment in the court below. (1).

I must here observe that, in my opinion (which in this respect differs from that expressed in the judgment of the Court of Common Pleas below), there might well be a state of things in which the assured could recover on this policy for a total loss of the freight, though the assured could not, either with or without notice of abandonment, recover against the underwriters on ship for a total loss. The questions between the assured and the two sets of underwriters are not the same. The question between the assured and the underwriters on the ship is whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before, without expending on it more than it would be worth. The question between the assured and the underwriter on the chartered freight is, whether the damage can be so far repaired that the ship can be at Calcutta, seaworthy for a voyage round the Cape of Good Hope, without expending on it more than it would be worth. I should have added a farther term, that the repairs could be done so promptly that the ship might arrive at Calcutta within a reasonable time, as between the shipowner and De Mattos, were it not for the case of *Hurst v. Osborne* (2), which seems to me an authority against this position. And though I should not hesitate to advise your lordships to reconsider that case if necessary, I think it is not necessary so to do in the present case.

My position therefore is, that if the ship had been so damaged that it could be brought to Calcutta, and there made seaworthy for a voyage round the cape, but not without expending, say

(1) Law Rep., 5 C. P., 876.

(2) 18 C. B., 144; 25 L. J. (C. P.), 209.

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£10,000, and would then, all things considered, be worth only £9,000, but that it could by an expenditure of £4,000 be made a ship quite fit for short voyages, though not for such a voyage as that round the cape, and would then be worth, say £5,000, there would be a total loss of the freight, though no total loss of the ship. No notice of abandonment whatever given to the underwriters on ship could have converted that which on those [118] figures was only a partial loss *into a total one. This was decided by the Exchequer Chamber in *Kemp v. Halliday* ⁽¹⁾, a case which was not cited at your lordships' bar, but to which I venture to refer your lordships, as the passages contained in pages 749 to 754 of the report will show your lordships that the opinions I now express are not formed for the first time.

I now proceed to consider the answer to your lordships' first question. That, in my opinion, depends upon a question of fact, which I think is answered by the very important addition to the case made during the argument in the Exchequer Chamber, and now contained in the case: "It is admitted that the sea damage which the ship sustained at New Zealand during the time covered by the policy would have justified an abandonment and claim for a constructive total loss." This can only mean that the damage to the ship was so great, that the ship could not be repaired without spending more than its worth, and consequently that the shipowner might justifiably elect not to repair.

I think that, under such circumstances, the shipowner had a right as against his underwriters on ship to come upon them for a total loss. But if he does so, then, on general principles of equity not at all peculiar to marine insurance, he who recovers on a contract of indemnity must and does by taking satisfaction from the person indemnifying him, cede all his right in respect of that for which he obtains indemnity. It was held, in *Mason v. Sainsbury* ⁽²⁾, that, the Hand-in-Hand Insurance Company having paid the plaintiff for a loss under a fire policy, was entitled to recover in an action in his name against the hundred. This cession or abandonment is a very different thing from a notice of abandonment, though the ambiguous word, "abandonment," often leads to confounding the two. There is no notice of abandonment in cases of fire insurance, but the salvage is transferred on the principle of equity, expressed by Lord Hardwicke in *Randal v. Cockran* ⁽³⁾, that "the person who originally sustains the loss was the owner, but, after satisfaction made to him, the insurer." In *Godsall v. Boldero* [119] ⁽⁴⁾ the same principle was acted upon in a case of life *in-

⁽¹⁾ 6 B. & S., 763.

⁽²⁾ 3 Doug. Ed. by Rosc (8 vo.), 61; ⁽³⁾ 1 Ves., 98.

Marshall on Ins., 794.

⁽⁴⁾ 9 East., 72.

insurance. That case was overruled in *Dalby v. The Indian and London Life Assurance Company* ⁽¹⁾, because the principle was misapplied to a life insurance, which is not a contract of indemnity; but the principle itself has never (that I know of) been questioned.

When, therefore, the party indemnified has a right to indemnity, and has elected to enforce his claim, the chance of any benefit from an improvement in the value of what is in existence, and the risk of any loss from its deterioration, are transferred from the party indemnified to those who indemnify; and, therefore, if the state of things is such that steps may be taken to improve the value of what remains, or to preserve it from farther deterioration, such steps, from the moment of election, concern the party indemnifying, who therefore the ought to be informed promptly of the election to come upon him, in order that he may, if he pleases, take steps for his own protection. And on general principles of law (still not confined to marine insurance), an election, once determined, is determined for ever, and such a determination is made by any act that shows it to be made. And, therefore, anything that indicates that the party indemnified has determined to take to himself the chance of benefit from an increased value in the part saved, and only claim for the partial loss, will determine his election so to do. I may refer for an exposition of this general principle to the judgment of the Exchequer Chamber in *Clough v. London and North Western Railway* ⁽²⁾.

In cases of marine insurance, the regular mercantile mode of letting the underwriters know that the assured mean to come upon them for a complete indemnity, is by giving notice of abandonment, which is a very different thing from the abandonment or cession itself. This notice when given is conclusive, that the assured, if still in a situation to determine his election, has determined to come upon the underwriters for a total loss, the consequence of which is that everything is ceded (to avoid the use of the ambiguous word "abandoned") to the underwriters. Chief Justice Abbott, in *Cologan v. London Assurance* ⁽³⁾, says, "I do not consider an abandonment as having the effect of converting a partial into a total loss." . . . "The abandonment, however, *excludes any presumption which [120 might have arisen from the silence of the assured that they still meant to adhere to the adventure as their own."

If before giving this notice the assured have already indicated by their acts, or if the circumstances are such that they indicate by their silence, that they have elected to adhere to the adven-

⁽¹⁾ 15 C.B., 365; 24 L.J. (C.P.), 2.

⁽²⁾ 5 M. & S., 456.

⁽³⁾ Law Rep., 7 Ex., 34-35.

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ture as their own, the notice of abandonment obviously comes too late. A very good example of such a case is afforded by *Mitchell v. Edie* ⁽¹⁾, as explained in *Roux v. Salvador* ⁽²⁾. There a ship laden with sugar, and bound for London, was captured and finally taken into Charlestown, where the sugar was sold and the proceeds lodged in the hands of a person resident in Charlestown. From the state of political affairs at that time, sugar was dear at Charlestown, and, as Lord Abinger conjectured, the sugar had come to a very good market, and the assured was satisfied, and took to the proceeds. A year afterwards, the person in whose hands the money was, became insolvent, and after that it was, with obvious justice, held that it was too late to come upon the underwriters for a total loss. Thus explained, the case is a good example of the principle stated in *Stringer v. England, &c., Insurance Company* ⁽³⁾, where it is said, "As is well pointed out in 2 Phillips, Insurance, s. 1669, where the cargo still subsists in specie, and may be recovered, the question depending on abandonment is, which party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insured. To allow the assured to change his election whilst the circumstances remain the same, would enable the assured to treat the property as his, so long as there was a prospect of profit from the rise in the market, and as the property of the insurers, so soon as there was a certainty of loss, which would be inequitable: *qui commodum sentit sentire debet et onus.*"

I should apologize to your lordships for dwelling so long on what seems to me the principle on which abandonment, and the necessity of notice of abandonment, when required, depend, had it not been argued at your lordships' bar, on the authority of [21] **Knight v. Fuith* ⁽⁴⁾, that there is a technical rule of insurance law by which notice of abandonment must be given if the thing exists in specie at all, though the state of things is such that the underwriters could do nothing in consequence of the notice. I think it more convenient to postpone my remarks on that case till I answer your lordships' last question. In the meanwhile I proceed to say that I should be very sorry to throw any doubt on the principle expressed by Lord Abinger in the following passage in his judgment in *Roux v. Salvador* ⁽⁵⁾, where, after stating the state of circumstances which give the insured a right to treat the case as one of total loss, he proceeds, "But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of in-

⁽¹⁾ 1 T. R., 608.

⁽²⁾ 3 Bing. N. C., 266.

⁽³⁾ Law Rep., 4 Q. B., 688.

⁽⁴⁾ 15 Q. B., 649.

⁽⁵⁾ 3 Bing. N. C., 286.

demnity that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures, at his own cost, for realizing or increasing that value."

But I think this is from the nature of things confined to cases where there are some steps which the underwriters could take, if they had notice. When they can do so, I think that the neglect to give a notice of abandonment may determine the owners' election. This is a matter that is now of much greater practical importance than it was when Lord Abinger delivered that judgment. For then the assured could not learn that his ship had got into difficulties at a distant place till long after the disaster, and the underwriters could only send out orders which would arrive later still. Under such circumstances a notice of abandonment was often a very idle ceremony, and in my opinion unnecessary, if the facts did amount to a total loss, inoperative if they did not. Now, when by means of the electric telegraph the underwriters' orders might promptly reach the spot where the ship was in peril, a notice of abandonment may be of great practical importance. What would be a reasonable time, and whether the neglect to give notice of abandonment does determine the election, must, I think, depend in each case on the circumstances, and principally on what steps the underwriters might take if they had notice. If there *was [122 nothing they could do, no notice I think is required. This I apprehend is the principle of *Cambridge v. Anderton* ⁽¹⁾, *Roux v. Salvador* ⁽²⁾, and *Furnworth v. Hyde* ⁽³⁾. For, as has often been observed, a sale by the master is not one of the underwriters' perils, and is only material as showing that there is no longer anything which can be done to save the thing sold for whom it may concern. It conclusively determines that neither assurers nor assured can do anything, and consequently that a notice of abandonment would be but an idle form on which nothing could be done, and which therefore is unnecessary.

If these which I have submitted to your lordships are the true principles on which the law depends, it seems to me to be obvious that in this case there was a total loss of the freight in consequence of the damage by sea perils being so great that the shipowner was not bound to repair the ship. No doubt the shipowner might have repaired it if he pleased, and if, as in *Benson v. Chapman* ⁽⁴⁾, he had elected to repair it, and had done

⁽¹⁾ 2 B. & C., 691.

⁽²⁾ 3 Bing. N. C., 286.

⁽³⁾ 18 C. R. (N. S.), 835; 36 L. J. (C. P.),

5 ENG. REP.]

33: Law Rep., 2 C. P., 204.

⁽⁴⁾ 2 H. L. C., 696.

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so, though at a ruinous expense, the freight would not have been lost. But the ship in this case never was repaired so as to make it capable of earning the freight, and the insured was under no obligation to make the repairs at a ruinous cost.

This brings me to the second question. I cannot see how the contract between the plaintiff and the defendant, by which the latter undertakes to indemnify the former against the loss of the freight, can be in any way affected by the fact that the plaintiff had made a contract with other persons by which they undertook to indemnify him against loss on the ship. If the facts are not such as to amount to a loss of freight from the perils insured against, no transaction between the plaintiff and third persons could make them amount to such a loss. If they were such as to amount to a loss of the freight it can make no difference to the now defendant whether the plaintiff can or cannot recover for the damage to his ship from other persons. It is true that a transaction with third persons may, as evidence, prove that the plaintiff had elected not to repair the ship, as the [23] sale of the *wreck in *Cambridge v. Anderton* ⁽¹⁾, and in *Furnworth v. Hyde* ⁽²⁾, did. And so, if the plaintiff in the present case had given notice of abandonment at once to the underwriters on ship, and recovered from them as for a total loss, it would have afforded conclusive evidence that he had elected not to repair the ship. As it was he delayed so long that I think the fair conclusion of fact is, that, as between him and the underwriters on ship, he had elected to take his chance of doing a better thing by keeping it as a ship to himself, and coming on the underwriters for a partial loss only.

I do not go into the facts, as the question whether the owner could have recovered as for a total loss on the policy on ship or not is only collaterally raised in this case, but in my opinion they completely bring the case within the principle stated by Lord Chancellor Cottenham in *Fleming v. Smith* ⁽³⁾, where he says: "They were sufficiently informed of what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured to them by the policy effected with the underwriters on the vessel; and if they acted upon that opportunity of election they surely cannot afterwards turn round and go against the underwriters as for a total loss." I should, therefore, as at present advised, have concurred with the Court of Common Pleas in the decision in *Potter v. Campbell* ⁽⁴⁾. But I think that this in no way affects the

⁽¹⁾ 2 B. & C. 691.

⁽²⁾ 1 H. L. C. 518.

⁽³⁾ 18 C. B. (N.S.) 835; 36 L. J. (C.P.), 38; Law Rep., 2 C. P., 204.

⁽⁴⁾ 16 W. R., 369. Printed papers in the case, 165.

question between the plaintiffs and the underwriters on freight. I agree with what has been said by my brother Brett; the plaintiffs not having come upon the underwriters for ship leaves the case just as if the ship had never been insured at all.

This brings me to consider whether it was necessary for the plaintiffs to give notice of abandonment to the underwriters on freight. It was argued at your lordships' bar that, by the law of marine insurance, a notice of abandonment was as imperatively necessary as a notice of dishonor is by the law merchant on bills of exchange. On this I shall submit some observations at the end of this opinion, but at present I will assume that the true principle *is that notice of abandonment is only re- [124] quisite when, from the state of facts, it may make a difference to the underwriters, if the assured delays making his election, whether he will adhere to the property, taking his chance of profit or loss from so doing, or come upon the underwriters for a total loss. If that be the principle, it seems to me to follow from it that, inasmuch as there was nothing which the underwriters on freight could have done to alter their position in consequence of a notice of abandonment, and that it would have been an idle ceremony, no notice could ever be required, and, not being required at all, could not be too late. These are the reasons for which I answer to your lordships' second question by saying, that in my opinion no notice of abandonment either of ship or freight was necessary to enable the plaintiffs to recover for a total loss on the policy on freight.

To the third question, that in my opinion no notice at all being required, it never could be out of time.

To the fourth question, that though I think that under the circumstances of this case the plaintiffs have precluded themselves from recovering for a total loss of the ship, that in no way affects the rights of the plaintiffs upon the policy on freight.

I now come to your lordships' fifth question. From what I have already written your lordships will perceive that in my opinion the decision of the case really should depend on the answer to this question. I have already indicated that I think that the assured so conducted themselves as to discharge the underwriters on ship from the liability for a total loss, for the assured took to themselves the chance of benefit from retaining the ship as their own, and so made their election as to the ship. But as to the freight, I can see nothing which could have been done by the underwriters if the idle ceremony of a notice had been gone through. It was indeed suggested that the underwriters on freight might have made some arrangements with the underwriters on ship, by which they were to repair the ship, send her on, and in the name of the owners tender her to De

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Mattos. But in all cases, and especially in cases of insurance, we look to what is practically possible, and not to remote theoretical imaginations. If it could be shown that the delay in this case, which was certainly considerable, had in any way altered [25] the position of the underwriters, if there *was anything which they could have done, if the claim had been made on them at the time when the disaster happened at New Zealand, or in the interval, which they cannot now do, or if any prejudice had been sustained by them in consequence of the delay, the case would be different. I should then have to consider whether the prejudice sustained was sufficient to give rise to a preclusion. But as the facts are, there is nothing of the sort. I therefore answer your lordships' fifth question by saying that in my opinion there was no such conduct as to discharge the underwriters from their liability upon the policy on freight.

The answers to these five questions would answer the sixth and last, were it not that I have reserved to this time the discussion of the proposition argued at your lordships' bar, that there is a technical necessity for a notice of abandonment in a case of marine insurance, whether any use can be made of it or not, and whether the failure to give it works any prejudice or not. It was said it was required by the law merchant as to insurance, just as notice of dishonor is required by the law merchant on a bill of exchange.

Such is the law in some foreign countries, but I will submit to your lordships my reasons for thinking that it is not and never was the law of England. Emerigon, in the first section of the 17th chapter of his celebrated Treatise on Insurance ⁽¹⁾, states that by the general law merchant, or as he calls it "*le droit des nations*," there was no need for any notice of abandonment, the contract being one of indemnity only. I do not pretend to have made any research myself as to what was the ancient law merchant, but from Emerigon's high character for learning and research I assume that he is correct. He then proceeds to say that the law merchant did not prohibit persons from making a stipulation that under certain stipulated circumstances the subject matter of the assurance might be abandoned to the underwriters, who then should pay the whole sum assured, without having any option merely to indemnify the assured. And he observes that doubtless the usual clauses to that effect gave rise to established rules on the subject. He then cites (p. 208) from Casaregis' three rules which Emerigon seems to consider as truly stating the law merchant on the subject. They are as follows: 1. That abandonment is a formality which is sufficient [26] *complied with by the simple fact that the assured

(1) Vol. ii, ed. by Boulay Paty, 1837, ch. xvii., s. 1, p. 207.

demands from the assurers payment of the whole sum insured. 2. That the assured may, without having recourse to abandonment, recover the salvage, and claim payment from the assurers of an average loss only. 3. That in case of total loss abandonment is an idle form, "*le délaissement est une formalité inutile.*" The editor of Emerigon observes in a note that the first and third of those rules are not the law of France at this day. And Emerigon points out that all this was in France (and, in consequence, in those countries which have adopted the French law) altered by the positive enactments contained in the celebrated *Ordonnance de la Marine* of 1681, by the 46th article of which it was enacted that "No abandonment shall be made except in case of capture, shipwreck, '*bris*' 'breaking up,' stranding, arrest of princes, or total loss of the things assured, and that all other losses shall be deemed average losses only." On this Emerigon treats at great length in the following sections of the 17th chapter.

There seems to have been at first much controversy and dispute as to the true effect of the enactment, but it seems to have been finally settled in France that the assured could never recover for a total loss without abandonment, even though the thing assured was totally destroyed. "Such," says Emerigon ⁽¹⁾, "is the enactment of our ordonnance, to which we must submit." And it was farther established that when any of the events specified in the 46th article had happened, the assured might by giving notice of abandonment recover for a total loss, though the thing insured was quite safe and uninjured. This Emerigon justifies, or at least accounts for, by saying that the ordonnance created a presumption, which was *juris et de jure*, that where any of the first five cases had happened the thing was lost. This was carried so far that where a ship was stranded and got off without injury either to itself or cargo, the owners of the cargo were permitted to give notice of abandonment and recover as for a total loss. This highly artificial conclusion was corrected by a supplemental ordonnance of 1779, but till then it remained the French law: Emerigon ⁽²⁾.

Now, the enactments of the French law, contained in the ordinance of the marine, can have no force in England, except in so far as they have been adopted into our law. As far as [127 regards the law that by giving notice of abandonment the assured can recover for a total loss, because by a presumption *juris et de jure* the property is to be taken as lost in law, though it is safe in fact, it certainly is not the law of England, and never was. In *Hamilton v. Mendes* ⁽³⁾, Lord Mansfield strongly laid

⁽¹⁾ Vol. ii, ch. xvii, s. 6, p. 292.

⁽²⁾ 2 Burr., 1108.

⁽³⁾ Vol. ii, s. 2, p. 212.

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down the doctrine that a policy of marine insurance is a contract of indemnity, and that "if the thing in truth was safe, no artificial reasoning shall be allowed to set up a total loss."

No one would for a moment now venture to contend that a notice of abandonment could in England entitle an assured to recover as for a total loss on a policy on goods if the ship was captured, though set free, or wrecked but the cargo saved uninjured, or in a case of simple stranding. So far the law of the ordinance is clearly not adopted in England. Even in the case where the loss is at the time of the notice of abandonment total, though capable of being reduced by a change of circumstances to a partial loss, the assured (unless in the very uncommon case of the notice being accepted) cannot recover as for a total loss if that change of circumstances does occur before the trial: *Dean v. Hornby* ⁽¹⁾. Nor can it be for a moment contended that a notice of abandonment is essential to the assured's right to recover for a total loss where the loss is in fact total.

But though in no one of these cases has the French enactment been adopted in the English law, it is argued that it has been so adopted as in the case of what is called a constructive total loss, to render a notice of abandonment a necessary technical preliminary to an action for the total loss, though it is not required for any useful purpose, though no prejudice has been sustained for want of it, though the loss at the time of the trial still continues total, and though, according to Casaregis, as cited and approved of by Emerigon, the law merchant looked on the notice of abandonment in case of total loss as being "*une formalité inutile*."

It is unnecessary to refer to any English decisions prior to the great case of *Roux v. Salvador* ⁽²⁾. All the authorities bearing on the point were, I believe, cited and considered in the [28] elaborate judgments delivered in that case; and the decision of the Court of Exchequer Chamber was that no notice of abandonment was necessary, because, as is stated by Lord Abinger ⁽³⁾, "Neither the assured nor the underwriters could at the time when the intelligence arrived exercise any control over the goods, or by any interference alter the consequences."

It may be, however, convenient to refer your lordships to the portion of Mr. Phillips' Treatise on Insurance in which he treats on this subject. I know of no text writer who treats the law of insurance with more learning, and certainly of none who treats it with as much sound sense and appreciation of the bearing of the doctrines laid down on practical business. It is, however, to be borne in mind that he writes in America, and that,

⁽¹⁾ 3 El. & Bl., 180.

⁽²⁾ 3 Bing. N. C., 281.

⁽³⁾ 1 Bing. N. C., 526; reversed in error, 3 Bing. N. C., 266.

as he clearly states⁽¹⁾, "It is a general rule in the United States, that if the ship or goods insured are damaged to more than half of the value by any peril insured against, or more than half the freight is lost, the assured may abandon and recover for a total loss." He adds, "this rule of abandonment on account of loss of over fifty per cent, of the value of the subject makes the most material difference between the American and English jurisprudence, relative to total loss and abandonment, and is to be kept in mind in examining the decisions of the tribunals of the two countries. This rule, and that rule in the United States, whereby the validity of the abandonment is tested by the circumstances existing at the time of making it, instead of the time of bringing the suit, as in England, give a wider range to constructive total loss and abandonment in the United States."

Bearing this distinction in mind, any one who wishes to understand this subject will derive great assistance from perusing the whole of Mr. Phillips' 17th chapter on total loss and abandonment. I will only refer your lordships to sect. 1491, where he says, "An abandonment being a transfer, it can be requisite only where there is some assignable transferable subject on which it can operate." "When nothing remains to be assigned or transferred, an abandonment is useless and unnecessary." And to sect. 1494, where he observes, "But the better rule in such case is that if the insured neglects to abandon, he shall recover only according to the state of *things at the trial; [129 since, as we shall see, under a declaration for a total loss he may recover for a partial loss, and the underwriter ought to have the advantage of whatever may occur to make the loss partial so long as the assured delays to elect a total loss. If he has judgment for a total loss, this is equivalent to an abandonment, and gives the underwriter a right to salvage." And to sect. 1497, where he says, "The distinction mentioned above as to recovering a total loss without abandonment is to be observed, viz., that the assured is charged with the proceeds in the adjustment of the loss as in a salvage loss, though the same may not have actually come to his hands. This circumstance being borne in mind will reconcile most of the decisions on this subject, which otherwise would appear to be directly contradictory, according to the language commonly used by the courts, which must, however, be construed in reference to one or the other description of case under consideration." Your lordships will appreciate the shrewdness of the latter part of this remark if you examine the various *dicta* cited in *Roux v. Salvador* ⁽²⁾ and *Knight v. Pailh* ⁽³⁾.

⁽¹⁾ 3d ed., vol. II., s. 1536, p. 271.

⁽²⁾ 15 Q. B., 649.

⁽³⁾ 3 Bing. N. C., 266.

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To return to the English authorities, the decision of the court of Exchequer Chamber in *Roux v. Salvador* ⁽¹⁾ was, as far as I can learn, received with general approbation at the time. There was, however, one exception. Lord Campbell never could be brought to think it right. In the case of *Fleming v. Smith* ⁽²⁾ the counsel for the appellants (the Attorney General Jervis, and Sir F. Thesiger, argued, as I think logically, from the decision in *Roux v. Salvador* ⁽¹⁾, that notice of abandonment could not be in any case required except where there was something which could be done by the underwriters in consequence; and then the failure to give notice of abandonment might be material as determining the election which the assured had, whether to treat the loss as total or not. This, as I have already stated to your lordships, is what I consider to be the law. Lord Campbell was of a different opinion, and in his opinion says, "The law therefore requires that notice shall be given in order to convert a constructive into a total loss;" but though that was his opinion, it was not the judgment of the house of lords. Lord Cottenham, chancellor (and Lord [30] Brougham *concurred in his opinion), carefully puts the decision exclusively on the ground that the assured had in fact elected to treat the loss as a partial loss only. This studied silence on his part may prevent us from saying that he differed from Lord Campbell; but he certainly did not express any concurrence with him.

After this in the Queen's Bench, when Lord Campbell was chief justice, there arose the case of *Knight v. Faith* ⁽³⁾. The manner in which that judgment came to be delivered was very peculiar. There was a very brief case stated for the opinion of the Court of Queen's Bench. On the statements in it the court came to the conclusion, as stated in the judgment, that "slight repairs might have been sufficient again to fit the ship for navigation," and the court said ⁽⁴⁾, that though the ship was sold, "we are of opinion that as against the insurers the sale is not shown to be lawful." On such facts the assured could never have recovered for a total loss, even if he had delivered all possible notices of abandonment from the first to the last. Yet the court forced the counsel to amend the case by inserting a statement that no notice of abandonment was given, and pronounced an elaborate judgment on a point which it was wholly unnecessary to notice, except for the purpose of recording dissent from the decision of the Exchequer Chamber in *Roux v. Salvador* ⁽¹⁾. It should in candor, however, be added that the

⁽¹⁾ 3 Bing. N. C., 266.

⁽²⁾ 1 H. L. C., 513.

⁽³⁾ 15 Q. B., 649.

⁽⁴⁾ Ibid., 657.

other judges of the court joined Lord Campbell in this. Still I think that the fact that a judgment was not necessary for the decision of the case before the court always diminishes its authority. And I think that on perusing the judgment in *Knight v. Faith* ⁽¹⁾, it will be found that no argument is produced which had not been used in *Roux v. Salvador* ⁽²⁾, and that no new authority is produced except Lord Campbell's own opinions in *Fleming v. Smith* ⁽³⁾, and a passage from the judgment of Lord Chancellor Cottenham in *Stewart v. The Greenock Marine Assurance* ⁽⁴⁾.

The question in that latter case was, what passed to the underwriters on ship, who were liable for a total loss of ship. They raised the very question alluded to in the section 1497 of Phillips already cited. The ship having been fatally injured just before it entered the docks, but kept together as a [131] ship so that it entered the docks, delivered the cargo, and so earned freight, and the underwriters on ship said they were entitled as salvage to the freight thus earned after the disaster. This house decided that they were entitled to this benefit, on the precise principle long before laid down in *Randal v. Cockran* ⁽⁵⁾, and the other cases I referred to in the beginning of this opinion, that the plaintiffs "claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all the benefit and advantage belonging or incident to it." But I cannot see how, or in what way, the assertion of the doctrine that recovering for a total loss operates as a cession of everything, can be said to amount to the assertion of that other doctrine that the handing in of a notice of abandonment is a condition precedent to the right to claim for a total loss. And as it seems to me every *dictum* cited in *Knight v. Faith* ⁽¹⁾ is capable of being reconciled with the judgment of the Exchequer Chamber in *Roux v. Salvador* ⁽²⁾ if it is only borne in mind that the abandonment or cession consequent on recovering for a total loss is one thing; the notice of abandonment, supposed to be a condition precedent to claiming for a total loss, is another. I have dwelt on this point at perhaps unnecessary length, for all that it is necessary to decide in this case is that where there is nothing to abandon no notice is requisite.

I have therefore to conclude by saying, in answer to your lordships' last question, that in my opinion judgment ought to be for the plaintiffs in the cause, the respondents in your lordships' house.

(1) 15 Q. B., 649.

(2) 8 Bing. N. C., 266.

(3) 1 H. L. C., 513.

(4) 2 H. L. C., 159.

(5) 1 Ves., 98.

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MR. BARON BRAMWELL: My lords, in this case I think it convenient to consider (though it has been already done in the judgments delivered) the precise effect of the contract the plaintiffs seek to enforce. The owners of the ship *Sir William Eyre* had entered into a charterparty with *De Mattos*, whereby the ship, then on a voyage to New Zealand, was to proceed to Calcutta, and there load a cargo for Liverpool or London, to be [32] provided by him. The *contract in question is a policy of insurance by the owners (now represented by the plaintiffs), whereby the underwriters insured against certain perils of the seas, which might happen on the voyage, then in progress, to New Zealand, preventing the owners from earning or being entitled to earn the charter freight. And the policy is to be taken to be a valued policy, and £4000 the value. The insurance did not extend to the voyage from New Zealand to Calcutta, the stay there, nor the voyage home. In effect, therefore, the insurance was against perils on the voyage to New Zealand which should prevent the ship getting to Calcutta in such a state as to give the owners a right of action against *De Mattos* if he did not load the cargo, and in such a state as should enable the vessel to bring the cargo home loaded, and earn the freight. For if *De Mattos* had loaded the cargo, and if, owing to perils covered by the policy (perhaps undiscovered at Calcutta), the vessel had failed to bring the chartered cargo home, I apprehend the underwriters would have been liable.

It seems to me, therefore, that on this policy there might have been a partial loss, with a partial or total loss of the ship. I am not speaking of what is probable, but it is possible, I suppose, that the ship might have been so injured on the outward voyage as to be unseaworthy for a whole cargo; it is possible that the charterer, though having a right to refuse to load an unseaworthy ship or a partial cargo, might have elected to do so. In each such case there might be a partial loss. And it is, I suppose, possible that a peril covered by the policy might have injured the ship in such a way that it became necessary to jettison a part of the cargo on the home voyage, and yet the rest might be carried home in the ship and freight earned. This also, I conceive, would be a partial loss, and without a total loss of the ship. So also, if by perils insured against the ship had been disabled from reaching Calcutta by an agreed time in the charter, or not in time to make the voyage the same as the charter provided for. I do not know that it is necessary to enter into these speculations, but to my mind they help to clear the matter.

It seems to me then that the insurance was that perils of the seas on the voyage to New Zealand should not destroy or prevent the right of action against *De Mattos*, to accrue on the ship's

*arrival at Calcutta, and his refusal to load, and should [133 not prevent the earning of the freight, if he performed his contract to load.

Whether such an insurance should be called an insurance on freight is only a question of words. But it is very important in most cases to use the right word. Certainly this insurance is practically more an insurance on ship in respect of freight than on the freight. For if the ship sustained no damage on the voyage to New Zealand from perils insured against, there could be no claim on the underwriters. This perhaps is true of all insurances on chartered freight till the cargo is loaded. For till then nothing that can happen to the cargo, or its carriage, can be in question. If Mr. Justice Willes' expression is accurate in this respect, this is wholly an insurance on the ship. He says, "The policy was in its nature therefore against total loss of freight by total loss of ship." Of course I do not mean that all the incidents of an ordinary insurance on ship attach, nor that none of those on freight does.

It seems to me that the statement of the case answers the first difficulty put on behalf of the defendant, viz., that De Mattos' insolvency, or the destruction of the ship by the cyclone, was the cause of the plaintiffs' loss of the freight. This is not so. For the perils on the outward voyage had put the ship into such a condition that the plaintiffs had no right of action against De Mattos for not loading. They thought they had when the vessel arrived at Calcutta, and so probably did De Mattos' agents. But they thought so because they did not know the true state of the facts. Had they sued De Mattos he would have had an answer that the ship was not seaworthy. Nor could they have said in reply that they were ready to make it so within a reasonable time. For its state was such that on its being known to them they would not have been ready to do so. One of the losses therefore insured against, viz., inability to enforce the charter against De Mattos, accrued by reason of perils insured against. The assured would indeed probably, as the charter freight was higher than the market rate, have lost the benefit of the charter by reason of De Mattos' refusal or inability to load, even though they had not lost it through perils of the sea. But the loss would have been different. They might have recovered damages from him, or proved against his estate. No doubt they would not, in this way, have got *£4000, but [134 they would have got something. I agree with the illustration of Mr. Justice Willes, of the house left out of repair, and subsequently burned down, and with that of Sir George Honyman, of an injury to a man's leg which a subsequent injury made it necessary to cut off. I think, therefore, there was a loss of the

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chartered freight by perils insured against, loss which accrued, and gave a vested cause of action when the ship was damaged by taking the ground at New Zealand.

Another difficulty made for the defendants was, that as the ship remained in specie, and could have been repaired so as to carry the cargo and earn the freight, and the assured did not think fit to repair, but abandoned the ship to the underwriters on ship, therefore the freight was lost, not by perils of the sea, but by the voluntary act of the plaintiffs. I think the answer to this is that it was not their voluntary act, but one to which they were practically compelled by the extent of the damage. If this argument is good, it must apply to every case of insurance on freight where the ship remains in specie. But this is not pretended.

I think, therefore, there was a loss of the thing, or one of the things insured, by perils insured against.

But the great question is, was there a total loss? I think this question ought to be, and is, unaffected by there having been an insurance on the ship. For suppose there had been none, then the ship, or its materials, would have belonged to the assured, who would have broken it up, or sold it to be broken up. In that case they would own the salvage of the ship, instead of the underwriters doing so. And indeed in this case the Court of Common Pleas held that the abandonment was ineffectual. There is no estoppel on that matter between the present parties, and the question there decided would have to be reconsidered in this case. But it seems to me immaterial whether the ship was insured or not, whether validly abandoned or not. In any case, if it was so damaged by the perils insured against that a prudent owner would not repair, the owners were rendered practically unable to enforce the charterparty against De Mattos, and so there would be a total loss of the chartered freight, actual or constructive. Now there was a damage or loss to such an extent. But the ship, though so injured, re-
[35] mained a ship, and could have been repaired so as to *earn the freight, though at a loss. The loss of the ship, therefore, though total, was what is called constructive, perhaps an unfortunate expression, but one for which I know no substitute. It was actually a total loss, the materials of the ship remaining in the form of a ship. In such a case if the materials cannot be kept together as a ship at an expense less than their value as a ship when so kept, plus their value as materials not so kept together, the vessel is totally lost, or rather the loss of the vessel is total. Whether what happened here should be called an actual or a constructive total loss seems to me very doubtful. I incline to think it was an actual total loss of the freight by a

constructive total loss of the ship. The damage or loss to a ship may be absolutely or necessarily total, as where it is burned or sunk to a hopeless depth. It may also be total where it remains in specie afloat or ashore. In that case it is so, or not, at the option of the assured. He may, if he thinks fit, treat the loss as partial and repair the ship. It is obvious that except in cases of valued policies the question is comparatively unimportant. In the case of a valued policy the question may be much more important.

But in both sorts of policies where the ship remains in specie, afloat or ashore, though the loss is really total, though the ship is practically lost as a ship, and what remains are only the materials of a ship fastened together in the form of a ship, the option is with the assured to keep his ship or his salvage, and claim for a partial loss, or to claim for a total loss, giving up his interest in the ship or its materials to the underwriters. This is abandonment. It always supposes there is something to abandon, something to cede. If the ship is burned, or sunk to a hopeless depth, there is nothing to abandon. So if it is dashed to pieces on the shore there is no ship to abandon; by the destruction of the ship the loss of the ship is total, and the pieces as a consequence belong to the underwriter. What would be the law in the supposable case of the ship being rebuilt of the old materials, to whom it would belong, and what consequences would follow as to other matters, it is not necessary to consider. It is enough to say that where the thing exists, as it is called in specie, in such condition as to be capable of utilization as the thing insured, the assured to claim for a total loss must abandon; where it does not *so exist he need not. Surely this is [136 equally true of goods and of every other subject of insurance. Now here there was absolutely nothing to abandon. To hold that it was necessary to abandon, or to give notice of abandonment, would be to hold, not that it was necessary to do, but to say something. For let what might be said, nothing would thereby be done, no possible effect could follow. I cannot find the notice of abandonment in the case, and I can hardly think what words could be used. If they were that all right to the freight was abandoned they would be idle words, for there was no such right, no right at all.

It is suggested that the underwriters might have chartered a ship and proposed to De Mattos to let them bring home the cargo. But the power to do this, and the possibility of their doing it, would not be anything, nor the consequences of anything abandoned to them. It would not be a right at all, much more a right acquired by abandonment. It might equally be done by them though there was no abandonment. But this is the

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utmost that can be suggested ; as there was nothing to be done, as nothing could be abandoned, nothing, no right, I think it was not and could not be necessary for the assured to say they abandoned, nor consequently to give any notice thereof. I beg to refer to the judgments of Lord Chief Justice Cockburn and Mr. Justice Lush on this point, to which I cannot profitably add.

But it is argued that though no notice of abandonment may have been necessary, or possible, yet that the assured ought to have given notice that they elected to treat the loss as total. That is, that they elected not to repair the ship, and so qualify themselves to enforce the charter against De Mattos. I may observe in passing that I could not, acting as a jurymen, find as a fact that they could have repaired the ship in time for it to be ready for the adventure for which De Mattos agreed to find the cargo ; and indeed, as the case stands, I should think he might have refused on the ground that the ship was a year overdue. But on the question of giving notice of their election, if they were bound to do so, it must be by virtue of some general rule of law, or some rule of insurance law, some implied part of the contract of insurance. I know of no such rule, either of the general or particular law. I know of no rule which compels a [37] person, having *an option, to give notice which way he exercises it, where the position of the other party would not be affected by the giving or withholding of notice, when his conduct would not be regulated thereby. On this point I refer to the judgment of Mr. Justice Lush.

The opinions in favor of the defendants seem to me to be influenced by a fallacy, which may be thus expressed. The plaintiffs, it is argued, are prosecuting the voyage or adventure till they give notice of abandonment of the ship ; therefore they are prosecuting what would give them a right to the freight ; therefore there could not be a total loss of freight at that time ; and that time was long after the damage, and therefore the total loss was not then actual. In a sense this is true. But as soon as the ship is abandoned there is a total loss of freight, or rather that which was doubtful when the damage happened, is, by the abandonment of the ship, ascertained to be a total loss of the freight. Suppose instead of abandonment, and instead of destruction by the cyclone, the assured had themselves broken up the ship at Calcutta, would not the loss of freight then have been total ? No doubt the cause of action would have accrued when the damage happened at New Zealand, and from that date the Statute of Limitations would run ; but the character of the loss would be doubtful till the owners of the ship elected to treat the loss of ship as total. Suppose this had

been a case of a sub-charter, viz., that the owner had chartered to the assured, who had subchartered to De Mattos. Whether in such a case there would be a total loss of the subchartered freight would depend on whether the shipowners elected to treat the loss of the ship as total. So here, though the owners and the persons with whom De Mattos made his charter are the same, yet it is on their election as owners to treat the ship as totally lost or not that their total loss of freight as letters of the ship, to charter depends. They fill two charters, owners and parties to the charter; on their election in the former character depends their loss in the latter. With great respect this seems to me the answer to the argument in the judgment of the Common Pleas. I think the judgment there for the defendants arises from not adverting to this consideration. No doubt had the owner repaired the ship the loss of freight would not have been total, *supposing the repairs in time for [138 the voyage for which De Mattos undertook to find a cargo, which, if it were in controversy, I could not find in the plaintiff's favor. True it is also that for a long time the plaintiffs thought they could and would repair, but when they found out they practically could not, and therefore would not, the loss of the freight, till then in doubt, became certain and fixed. On these grounds I think no notice of abandoning of the freight was necessary.

On the question of whether, if notice of abandonment was necessary, it was given in time, I feel this difficulty. Thinking none necessary, I have yet to say when it ought to have been given. Whether the assured used due diligence in the performance of a duty which did not exist? I come to the conclusion that if it was necessary to be given, it was not given in time. I agree with the reasoning of Mr. Justice Willes on this. It is a rule that where a man is put on informing himself, he is in the same position as though he had notice. I think that what had happened was enough to make the assured bound to inform themselves as to the extent of the damage. I think their delay in doing so was unreasonable, bearing in mind that the stay in New Zealand was attributable, in part at least, to their own misconduct in breaking the law. Farther, I incline to think the question raised by Mr. Justice Willes should (?) be answered unfavorably to the assured. I think that (as a matter of fact, not as a matter of law) the vessel should have been taken to Sydney to be examined: see *Gernon v. Royal Exchange Assurance Company* (?). On this part of the case I feel great doubt, arising from the complication of the facts and the conflict of opinions.

(?) Law Rep., 3 C. P., 562.

(?) 6 Taunt., 288.

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Dealing generally with the case, I cannot but think that much of the difficulty has arisen from the unusual nature of the policy and the peculiar circumstances of the loss, the delay, the insolvency of the charterer, and the subsequent destruction by the cyclone. For suppose the ship safe and arrived at Calcutta, the charterer ready to load, a policy on the freight extending to perils at and from Calcutta, and the day before the loading began the ship driven ashore by a storm, and so damaged as certainly and obviously not worth repair, in short, a constructive total loss, would *abandonment then have been necessary, and of what? There would have been, could have been, nothing to abandon. But that case does not in substance differ from the present. Suppose that instead of the vessel proceeding to Calcutta its state had been known in New Zealand, and that it was not worth repair, and suppose there had been no insurance on ship, but the owners had kept it there existing in form as a ship, but used as a coal hulk only, would there not have been a total loss of this freight, and would notice of abandonment have been necessary? It seems to me clearly not.

I answer your lordships' questions as follows: To the first, yes; the second, no; the third, no; the fourth, no; the fifth, no; the sixth, for the respondents.

MR. BARON MARTIN: My lords, I assure your lordships that if I had merely consulted my own feeling I would rather not have delivered my opinion upon this case; but having read very carefully the judgments delivered in the Court of Common Pleas and in the Exchequer Chamber, and having arrived at the conclusion that the judgment of the Court of Common Pleas and that of my brother Cleasby in the Exchequer Chamber are right, I think it my duty to state the reasons which have led me to that conclusion, especially as your lordships will find yourselves obliged in determining this case to decide what is the effect of a constructive total loss of ship upon an insurance on freight. Under these circumstances your lordships will excuse me for bringing before you my view, and the more so as it is not exactly that either of my brother Cleasby or of the Court of Common Pleas.

This is an action upon a policy of insurance on freight, and the main question arises upon a novel state of facts. Nothing similar, so far as I know, has been the subject of decision in a court of law: [His lordship here gave a statement of the facts of the charter and of the policy.]

The plaintiffs, to succeed, must establish that the freight from Calcutta to England was lost by a peril which occurred on or before the 5th of August, 1863, when the last of the thirty days expired, and their contention is that the facts stated in the special case do *so. The material ones are these: the ship

arrived at Southland on the 23d of April, 1863, and remained there until the 31st of July. Whilst there it sustained very considerable damage. Upon the 4th of July it arrived at Otago, and there discharged the remainder of the cargo, was surveyed whilst there, but there being no dry dock at the place, the extent of damage could not be ascertained. And I think it must be taken that the master acted *bonâ fide*, and believed that with some temporary repairs the ship would be capable of proceeding in ballast to Calcutta, and there made fit to carry the chartered cargo to England and earn the freight. The temporary repairs were not commenced until February, 1864, and the ship remained at Otago (Port Chalmers) until the 14th of April. The cause of the delay is thus stated in the 14th paragraph of the case: "The Sir William Eyre remained at Port Chalmers until the 14th of April, 1864, being prevented solely by want of funds from making the necessary preparation to proceed to Calcutta; the master had not sufficient funds to defray the ship's charges and disbursements, and the liabilities which had been incurred in New Zealand, and not being able to raise such funds in New Zealand, nor Messrs. Dalgetty, to whom the ship was consigned at Otago, being willing to advance him the money he required for the purposes aforesaid, he was obliged to wait until he had obtained a sufficient remittance from the plaintiffs." Whilst the ship was there the master, in order that it might not be wholly unproductive, used it to store coal, and earned upwards of £700 for storage rent. On the 14th of April the ship sailed for Calcutta, and arrived there on the 7th of June. The master immediately went to the agents of De Mattos, and applied to them to carry out the charter. A copy of it had several months before been forwarded to them, but De Mattos had become insolvent in the December previous, and they had provided no cargo, and absolutely refused to provide any, or to have anything to do with the ship. The ship was afterwards put into a dry dock and surveyed. The surveys are set forth. On the 2d of August, upon the receipt, in the United Kingdom, of the survey, dated the 8th of June, the plaintiffs gave notice of abandonment of the ship to the underwriters on ship, and of freight to the defendants, the underwriters on the freight. Neither were accepted. The ship in its damaged state was of [14] the value of £3000. On the 8th of October the ship was stranded in a cyclone and became a wreck. Paragraph 24 of the case is as follows: "It is admitted that the sea damage which the ship sustained at New Zealand during the time covered by the policy was such as would have justified an abandonment and claim for a constructive total loss." There are some other statements in the case, but the above are the material ones.

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Upon these facts it was contended, first, that there was a loss of the freight insured by perils of the sea at New Zealand, by reason of the damage sustained at Southland before the expiration of the thirty days. This contention, I think, cannot be sustained. The loss of the ship no doubt causes a loss of freight, but there are two kinds of losses of ship, actual and constructive, and so long as a ship exists in specie, and retains the character of a ship, and is dealt with as such, and is capable of being repaired, there is no actual loss; there may be the elements of an inchoate constructive total loss, but to make such a loss of ship there must be an abandonment: *Knight v. Fuith* ⁽¹⁾. The only case referred to in the judgment of the Exchequer Chamber upon this point was *Roux v. Salvador* ⁽²⁾. But it seems to me to have no bearing upon it. It was an insurance on hides from Valparaiso to Bordeaux. The ship sprung a leak, and put into Rio; the hides were found there to be in an incipient state of putrefaction, and it was certain that if they had been sent on to Bordeaux they would have lost the character of hides and become a mass of putrefaction before their arrival. The master of the ship sold them at Rio, and it was held to be not an average but a total loss, with benefit of salvage. I do not see how this case bears upon the present. This ship, after the expiration of the thirty days, existed in specie, was treated and dealt with as a ship, performed a two months' voyage from New Zealand to Calcutta without apparently exhibiting any symptom of weakness or damage, and was tendered by the master to De Mattos' agents there as a ship capable of being repaired and earning the insured freight, and was of the value of £3000. Under such circumstances, I think there could not be a loss of freight by perils of the sea until the plaintiffs had elected not to repair the ship and not prosecute the voyage from Calcutta.

[42] *Secondly, it was contended that there was a constructive total loss of the ship by the abandonment to the underwriters of the ship on the 2d of August. The Court of Common Pleas in a case, *Potter v. Campbell* ⁽³⁾, which was an action upon a policy on the ship, adjudged that the abandonment was not in time, and that there was not a constructive total loss of ship.

I think this judgment right, and I understand all my learned brethren are of the same opinion. I also agree with them that the constructive total loss of ship and the validity of the abandonment are not the test of the defendant's liability, and that the question is the same as if there had been no insurance on the ship at all. The main and substantial question is, was the freight from Calcutta lost to the plaintiffs by perils of the sea?

⁽¹⁾ 15 Q.B., 649.

⁽²⁾ 3 Bing. N. C., 266.

⁽³⁾ 16 W. R. 399. Printed papers in the case, 165.

In my opinion this is to be determined by the state of facts existing at the time the plaintiffs elected not to repair and prosecute the voyage from Calcutta to England, and is in a great measure, if not entirely, a question of fact. When the policy was effected the subject insured was freight expected to be earned, and if the ship had been sunk or wrecked before the expiration of the thirty days (the 5th of August, 1863), the defendants would have been liable, for the expected freight would have been lost proximately, indeed directly, by a peril of the sea. But the ship arrived at Calcutta, and assuming the liability of the defendants to be then continuing, it seems to me that the ordinary rule as to insurance on freight applies, viz., there must have been cargo at Calcutta in order to earn it; if there was no cargo, it might be that the plaintiffs might have had a cause of action against De Mattos for not providing it; but unless there was cargo the freight insured was lost to the plaintiffs, not by the perils of the sea, but by the default of De Mattos. The ship arrived at Calcutta on the 7th of June, and was immediately tendered to De Mattos' agent, under the provision in the charterparty; but he had become insolvent in December previous, and the agent declared that he had no cargo for the ship, and would provide none, and did provide none. Therefore before the extent of damage was ascertained, and the election not to repair made, the earning of the freight had become hopeless, indeed impossible, and was in reality and truth lost to the plaintiffs by a *cause wholly beside, and [143 independent of, the perils of the sea. It seems to me a crucial test that if the ship had sustained no damage, and had arrived at Calcutta perfectly sound and seaworthy, the freight would have been equally lost to the plaintiffs. In my opinion the utmost that can be said is, that if De Mattos had been willing to provide the cargo, and had had it to provide, there would have been a loss of the freight by reason of the damage to the ship at New Zealand. But this hypothetical loss is not a loss by perils of the sea for which underwriters are liable. It is a well established and settled rule that the underwriter is liable for no loss which is not proximately caused by the perils insured against. The maxim, "*Causa proxima non remota spectatur*," is a fundamental principle of insurance law. The rule laid down by Lord Ellenborough in *Forbes v. Aspinall* ⁽¹⁾ is, "that it is incumbent upon the assured, in order to recover on a policy on freight, to prove that unless the perils insured against had intervened the freight would have been earned." The facts stated in the special case disprove this, indeed prove the contrary.

It has hitherto been assumed that De Mattos was bound to

(1) 18 East., 325.

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supply a cargo at Calcutta; but it is quite clear that he was not, and that he was discharged from this obligation by the delay at New Zealand. In any action brought against him it would have been a material and traversable averment, that the ship had sailed and proceeded from New Zealand to Calcutta in a reasonable time, and this the delay at New Zealand would have disproved. De Mattos was in no way responsible for or concerned with this delay, and its existence would have been an answer to the action against him.

In my opinion, therefore, the freight was not lost by perils of the sea; the proximate and direct cause of its loss was the non-existence of cargo, and to bring the perils of the sea to bear upon it two things must have existed which do not; one that De Mattos was willing to provide cargo, although he was under no legal obligation to do so; the other that he had had it to provide.

For these reasons I think the underwriters are not liable. But a much more important question remains behind, viz., the application of the principle of constructive total loss of ship to insurance on freight. No case has been cited, and I believe [44] none exists, in *which this has hitherto been done. The doctrine as regards ship was conclusively established by this house in 1847, in the case of *Irving v. Manning* ⁽¹⁾. But it must be admitted by its warmest admirers, that its application coupled with valued policies has in many instances enabled shipowners to obtain and compelled underwriters to pay double the value of ships which the owners were desirous to get rid of.

For the purpose of this question it may be assumed that De Mattos had provided a cargo, and was ready and willing to load it. There are several definitions of constructive total loss, but that given by Chief Justice Tindal in *Roux v. Salvador* ⁽²⁾ is generally adopted, that where the damage to the ship is so great from the perils insured against, as the owner cannot put it in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship (when repaired), he is not bound to incur the expense, but is at liberty to abandon and treat the loss as a total loss and recover the whole amount. A constructive total loss of ship can therefore only be upon condition that the assured shall abandon the ship. Abandonment is of the essence of it, it is a different thing altogether from total loss with benefit of salvage, of which *Roux v. Salvador* ⁽³⁾ is an instance. The word "abandon" is one in ordinary and common use, and in its natural sense well understood; but there is not a word in the English language used in

(1) 1 H. L. C., 287.

(2) 1 Bing. N. C., 526, 538.

(3) Id. and 3 Bing. N. C., 266.

a more highly artificial and technical sense than the word "abandon;" in reference to constructive total loss, it is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property of the ship to the underwriter as a sale for valuable consideration, so that of necessity it vests in the underwriter a chattel of more or less value, as the case may be. In the numerous discussions which preceded the final establishment of the doctrine of constructive total loss, nothing was more strenuously urged in favor of it than that by abandonment the underwriter became the absolute owner of the ship, a thing of value, capable of being repaired and earning freight, if the abandonee thought fit. A constructive total loss is grounded upon a calculation. In the present case the calculation would be, present value of the ship £3000, expense of repairs £7500, total £10,500; against value of the ship when repaired £5,264, freight which if repaired the ship would have earned, say £3500, total £8764. The valued freight was £4000. It would therefore be for the pecuniary interest of an uninsured owner of ship not to repair, and if insured to abandon the ship and claim for a total loss; but against this the underwriter would have the ship of the value of £3000. The present question is, in such case can the freight be truly said to be lost by perils of the sea? The assured has made a calculation upon certain items, one of which is this very freight, and satisfied himself that it is for his pecuniary interest to sacrifice it and make no attempt to earn it, and has by his own voluntary act transferred the ship, by which alone it could be earned, to a third person, and thus deprived himself of the possibility of earning it. The freight is lost, remotely it may be, in consequence of sea damage, or in other words the perils of the sea, but directly and proximately by the voluntary act of the assured himself. The perils of the sea may be "*the sine qua non*," but certainly they are not the "*causa causans*." Suppose the underwriter thought fit to repair the ship and earn the freight, as he has a right to do, the underwriter on freight would be free, the event would have happened the not happening of which by reason of certain perils creates his liability. And can it be that the right of the assured and the liability of the underwriter on freight depend upon the conduct of a third person a stranger to both, and over whom neither of them has any control?

But the point seems to me decided by the cases of *McCarthy v. Abel* ⁽¹⁾ and the *Scottish Insurance Company v. Turner* ⁽¹⁾ in

⁽¹⁾ 5 East, 388.

⁽¹⁾ 1 Macq. Sc. Ap., 328, 334.

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this house. In *McCarthy v. Abel* an insurance had been effected on homeward freight from Riga. The greater part of the cargo had been loaded, but on the 7th of November, 1800, the ship was seized under a Russian embargo. On receipt of the intelligence the assured gave notice of abandonment to the underwriters on the ship and on freight, he having effected separate [146] insurances with *different sets of underwriters. The embargo was taken off in May, 1801, and the ship arrived safely and earned freight. This freight belonged to the underwriter on ship by reason of the abandonment, and the assured brought an action against the underwriter on freight as for a total loss. The court held it could not be recovered. Lord Ellenborough said it could not, for two reasons; first, that there had been no loss of freight at all, as in the event the freight had been earned; second, that if it could be considered in any other sense lost to the assured, it had become so by his own act in abandoning the ship to the underwriter thereon, with which, and its consequences, the underwriter on freight had nothing to do. The principle of the second reason of this judgment seems to me directly against the plaintiffs' contention in the present case. I will hereafter refer to the *Scottish Insurance Company v. Turner* (1); for my own part I am at a loss to see why, if the contract of insurance of freight in the present case was of any value, it did not pass to the underwriter on ship by the abandonment, so that the plaintiffs' interest in it was at an end before action brought; and it is not alleged that the action was brought or is now maintained for the benefit of the underwriter on ship.

But, secondly, suppose the ship was not insured, and that upon the above calculation it would have been for the pecuniary interest of the plaintiffs not to repair but to abandon the charterparty and the voyage to England. He would then have the ship of the value of £3000. Can it be that he can secure this and at the same time compel the defendants to pay him the freight as if the ship had become an actual wreck at New Zealand? There would be no obligation upon the plaintiffs to sell the ship or break it up, and if, after they had received the sum claimed (£4000), they thought fit to repair it, there would then be a ship sailing the sea, and earning freight, which had by construction of law been totally lost. Nor is there any reason why, by application of the same principle, the ship might not be totally lost half a dozen times over with the same result?

But it is said the plaintiffs have abandoned the freight. It is true that in one sense they have abandoned it, they have thrown up the adventure, and if there was anything to earn have, so far [147] * as in them lay, deprived the defendants of the possibility

(1) 1 Macq. Sc. Ap., 328, 334.

of its being earned. But they have made no abandonment in the sense of transferring to the defendants a thing of value, anything which might go in part to indemnify them against the payment of the loss. The abandonment was a mockery, there was nothing to abandon, not even a right of action against De Mattos for not loading the ship. It is an abuse of language to call this an abandonment of freight in the sense and meaning of the word in reference to a constructive total loss.

In the case of *Scottish Insurance Company v. Turner* ⁽¹⁾, there were separate insurances on ship and freight. The ship sustained such damage as to justify an abandonment, but it was not known until the arrival of the ship with her cargo at the port of discharge. The plaintiff then abandoned to both sets of underwriters. The underwriters on ship seem to have accepted the abandonment and became entitled to the freight. The plaintiff then brought an action against the underwriters on freight and claimed a total loss. He contended (the precise contention of the plaintiffs here) that the real cause of the loss to him was the perils insured against, that the abandonment of the ship was a legal and proper act superinduced by these perils; that it made no difference to him that the freight was earned by the master of the ship, who became agent to the underwriters on ship by the abandonment, *as it was lost to him*. The Court of Session in Scotland held him entitled to recover, but your lordships reversed the judgment, and held that the freight was lost to the plaintiff by his own election in abandoning to the underwriters on the ship, and not by the perils which caused or led to that election. This appears to strike at the root of the argument on behalf of the plaintiff, that the freight was lost by the damage sustained at New Zealand. It was said this case did not govern the present, because the abandonment was after the freight was earned. I do not see how this affects the principle of the judgment. But in the case of *McCarthy v. Abel* ⁽²⁾ the abandonment was before the freight was earned.

I think these cases have a distinct bearing upon the present question. The plaintiffs could have repaired the ship, but, for their own pecuniary interest, elected not to do so, and abandoned it. * The present question is, did they thereby secure to [148 themselves the sum insured on freight as if the ship had gone to the bottom at New Zealand, or did they discharge the underwriters on freight?

There is a farther subordinate point, viz., that the defendants were discharged by the delay at Otago. I have already said that in my opinion De Mattos was thereby discharged from the obli-

(1) 1 Macq. Sc. Ap., 328, 334.

(2) 5 East, 388.

gation to load the ship. He was entitled to have the ship dispatched from New Zealand in a reasonable time, and he was neither directly nor indirectly concerned with the want of funds wherewith to repair her between July, 1863, and February, 1864. The ship was used for a very considerable time as a store ship, a purpose quite beside and foreign to, indeed inconsistent with, the due prosecution of the voyage contemplated by the charter and the policy of insurance. The time is not stated, but it must have been considerable, as the storage rent amounted to between seven and eight hundred pounds. Looking at the time actually occupied by the repairs and by the voyage to Calcutta, the ship ought to have been there in October or November, 1863, and no one can tell what would have been the consequence if it had arrived before De Mattos' failure, and had found a cargo awaiting its arrival by the carriage of which a good freight would have been earned. It might have materially affected the judgment of the plaintiffs as to repairing. It may be said that the occasion of the delay was the perils insured against, and had there been no damage there would have been no delay. But the underwriters on freight were under no obligation to make these repairs, or provide funds for the purpose. The delay for a time necessary to make them was excusable; but the delay from July to February consequent upon the misunderstanding between the plaintiffs and their agent at Otago as to advances seems to me to be the misfortune of the plaintiffs, and one with which the defendants are in no way connected. I agree with the judgment of the Court of Common Pleas, that great and substantial delay is attributable to the plaintiffs in keeping the ship at Otago, and is traceable to causes for which they and the master were alone answerable, and not to sea perils. The question is, does this delay discharge the defendants? The case of [49] *Mount v. Larkins* (*) and the judgment of *Chief Justice Tindal, were much relied on. He says that the voyage "commenced after an unreasonable interval of time becomes a voyage at a different period of the year, at a more advanced age of the ship, and in short a different voyage from that prosecuted with reasonable and ordinary diligence; the risk is altered from that which was intended by all parties when the policy was effected." Besides this, it seems to me that persons who carry on the business of underwriting have a right to have the voyage insured prosecuted with due and reasonable dispatch, in order that their risk may be determined within a reasonable time. There can be no doubt as to the delay. The question is, do the facts stated in the special case excuse it as between the plaintiffs and the underwriters on freight? I think they do not.

(*) 8 Bing., 108, 122.

The law and all the cases on the subject will be found in Mr. Arnould's book ⁽¹⁾.

The result is, that in my opinion there are only two ways by which the plaintiffs below can establish a case against the defendants. One is, that the sea damage at New Zealand being such as would have justified an abandonment and a claim for a constructive total loss of ship, was a loss of the freight by perils of the sea at New Zealand, and entitled the plaintiffs to maintain an action upon a writ sued out immediately after this damage occurred. This I think not sustainable, and that until the plaintiffs elected not to repair and not to prosecute the voyage from Calcutta, there was not a loss of the freight "by perils of the sea" in any sense. The other argument of the plaintiff is, that all the circumstances of the case, including the election not to repair and the abandonment of the ship and freight in August, 1864, constituted a loss of the freight by perils of the sea. I have already stated at length why I think they do not. It may suffice to state here that one of these circumstances, viz., that no cargo ever existed whereby freight could be earned, created the real and actual loss of freight before the election not to repair and the abandonment were made, and that this, and not a peril of the sea, was the direct and proximate cause of the loss of freight to the plaintiffs.

*The liability of the underwriters is upon a written contract, if the contract be that they shall pay £4000 if the ship should sustain damage from the perils insured against on the voyage from the Clyde to New Zealand and the thirty days there, to such an extent that a prudent uninsured owner would not have repaired, or in other words be a wager policy that such damage should not occur, the underwriters are liable. On the other hand, if the contract be one of indemnity, and that it is essential for the plaintiffs to show that the freight insured was lost to them by reason of such damage, the underwriters are not liable, for as a matter of fact it is established beyond doubt or controversy that the freight, and all remedy in respect to it, was lost to the plaintiffs by the insolvency of De Mattos and its consequences, and the unjustifiable detention and delay of the ship at New Zealand.

The facts stand in the following order: First, policy on freight; secondly, damage to ship capable of being repaired, but to such an extent as to make repair not prudent for ship-owner; thirdly, failure of charterer to provide cargo wherewith to earn the freight; fourthly, election not to repair.

The question is, are the underwriters on the freight liable under these circumstances? I think they are not.

(¹) Vol. 1, c. xiii, s. 5, p. 383.

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I answer your lordships' first question, that there was not a loss by the perils insured against during the term of policy.

I answer the second, that notice of abandonment either of ship or freight was not necessary in one sense of the word "abandonment;" but notice of the election of the assured not to repair, and to give up and abandon the voyage, was, under the circumstances, necessary to enable the assured to maintain an action against the underwriters.

I answer the third question, that if notice of abandonment was necessary it was not given in time.

I answer the fourth question, that the notice of abandonment of ship does not, as such, affect the right of the plaintiffs upon the policy on freight.

I answer the fifth question; that there was such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight.

[51] *I answer the sixth question, that judgment ought to be given for the appellants.

1878. May 5. LORD CHELMSFORD: My lords, this is a case of some novelty, and from the difference of opinion which has existed upon it amongst the judges must be regarded as not entirely free from difficulty.

The action is upon a policy of insurance upon freight to be earned by a ship called the *Sir William Eyre*, of which the plaintiffs were owners as mortgagees under a charterparty entered into with one *De Mattos* on the 9th of February, 1863, by which it was agreed that the ship should proceed to New Zealand with a cargo for the owners' benefit, and having arrived and discharged the same, and being made tight, staunch, and strong, and everyway fitted for the voyage, should proceed to Calcutta, and there being tight, staunch, and strong, and everyway fitted for the voyage, should load from the factors of the freighter a full and complete cargo, and convey it, for certain stipulated freight, to Liverpool or London.

The policy of insurance is "lost or not lost at and from Clyde to Southland while there, and thence to Otago (New Zealand), and for thirty days in port there after arrival." The subject of the insurance is "£4000 on homeward chartered freight."

The *Sir William Eyre* arrived at Bluff Harbor, Southland, on the 23d of April, 1863. While there she drifted and took the ground, and remained aground, floating at intervals till the 29th of May. On that day a violent gale arose, and again the ship took the ground, and remained fixed till the 4th of June. After that she grounded again, and was not finally got off till the 1st of July, when she left for Dunedin; and she arrived at Port Chalmers, which is the port of Dunedin, on the 4th of July.

Surveys were held on her at Bluff Harbor and also at Port Chalmers; but in neither of these places could the extent of the damage sustained by her grounding be ascertained, as it was necessary for that purpose that she should be taken into a dry dock, or put on a patent slip, neither of which existed in New Zealand, nor was to be found anywhere nearer than Port Sydney.

While the Sir William Eyre remained at Port Chalmers the *captain permitted her to be stored with coals, for which [152 he received a rent.

In February, 1864, the captain received funds, by means of which he had certain repairs done which had been recommended by the surveyors, to enable the ship to proceed in ballast to Calcutta. On the 14th of April, 1864, these repairs having been completed, the Sir William Eyre left Port Chalmers, and she arrived at Calcutta on the 7th of June, 1864.

Upon her arrival the master applied to the agents of De Mattos to carry out the charterparty. They, however, had received information that De Mattos had failed and stopped payment in December, 1863, and they refused to have anything to do with the ship, or with providing a cargo.

The Sir William Eyre was then put into dry dock and surveyed, and it was discovered that the damage she had sustained in New Zealand was much greater than had been supposed, and that the cost of repairing her would exceed her value after being repaired. Whereupon, in the month of August, 1864, the plaintiffs gave notice of abandonment to the defendant the underwriter on freight, and a similar notice was given by them to the underwriters on ship: but neither of the notices was accepted by the underwriters.

Upon the argument of the case in the Court of Common Pleas it was held that the plaintiffs were not entitled to recover, on the ground that there was no absolute loss of the ship, and consequently no total loss of the freight; and that the notice of abandonment which was necessary to convert a partial into a total loss was not sufficient. Upon appeal to the Court of Exchequer Chamber, the judgment of the Court of Common Pleas was reversed, on the ground that the loss of the freight was not a partial loss, but one that was total and absolute.

Two of the judges in the Exchequer Chamber expressed an opinion that supposing it to be doubtful whether, if no notice of abandonment of either ship or freight had been given, the underwriters on freight would have been liable, yet as notice of abandonment was in fact given to the underwriters on the ship, and was clearly in their opinion given in sufficient time, the ship belonged to the underwriters, and it therefore became impossible for the *owners to earn the chartered freight, of which [153

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there was consequently an actual and not merely a constructive total loss.

Upon this appeal from the judgment of the Exchequer Chamber the questions raised were :

1st. Whether there was an actual total loss of the chartered freight by perils insured against during the term of the policy ?

2d. Whether notice of abandonment either of ship or freight, or both, was necessary to enable the plaintiffs to recover for a total loss on the policy on freight ?

3d. If notice of abandonment was necessary, whether the notice was given in time ?

4th. Whether the conduct of the plaintiffs, the owners of the ship, after the time of the injury sustained by her at New Zealand, was such as to discharge the underwriters from their liability upon the policy on freight ?

First, upon the question as to the loss of the freight, it is necessary to bear in mind the exact nature of the insurance. The freight insured is chartered freight upon a cargo to be loaded on board the *Sir William Eyre*, at Calcutta, and to be conveyed to Liverpool or London. The voyage insured is a voyage "at and from Clyde to Southland, while there, and thence to Otago (New Zealand), and for thirty days in port there, after arrival." In other words, it is an insurance that the assured shall not be prevented earning the freight under the charterparty by any perils of the sea which might happen on the voyage from Clyde to Otago, and for thirty days afterwards. As this outward voyage is entirely distinct from that on which the freight was to be earned, and as no right to such freight could possibly accrue until the arrival of the *Sir William Eyre* at Calcutta, the loss of freight could only happen by such damage to the ship by the perils of the sea during the time covered by the policy as would prevent the assured from earning the chartered freight on the voyage from Calcutta to England.

It is admitted that the sea damage which the ship sustained at New Zealand, during the time covered by the policy, was such as would have justified an abandonment, and a claim for a constructive total loss. The owners might, if they pleased, have repaired the ship, and she might have been sent to Calcutta in a fit state for a voyage from thence to England. But they [154] merely effected *temporary repairs sufficient to enable the ship to reach Calcutta; and on her arrival there a survey disclosed the extensive nature of the injuries which she had sustained in New Zealand, and the consequent impossibility of her performing the homeward voyage without such an amount of repairs as would have cost more than what her value would have been when repaired. Upon this fact being ascertained,

notice of abandonment was given to the underwriters, which, if sufficient, would have entitled the shipowners to recover for a total loss.

Upon these facts and circumstances the first question arises, was there a total loss of the freight during the period covered by the policy?

In determining this question, I think it right to leave out of consideration the fact of the insolvency of De Mattos before the arrival of the ship at Calcutta, because, although one of the learned judges whose assistance your lordships had upon the hearing of the appeal, delivered an opinion that "the freight was not lost by perils of the sea, but that the proximate and direct cause of its loss was the non-existence of cargo," it appears to me that this is not a correct view of the case. Between the underwriters and the assured on freight the question is, whether the ship had sustained such damage in New Zealand as to prevent her arriving at Calcutta in such a state of seaworthiness as would enable her to be tendered to the charterer in the terms of the charterparty, as being "tight, staunch, and strong, and everyway fitted for the voyage" to England. Upon this question it is obviously immaterial whether a cargo would have been provided at Calcutta or not. The loss for which the underwriters are liable (if at all) cannot depend upon such a contingency; and if it could, it must be observed that their liability attached long before the insolvency of De Mattos, which happened in December, 1863, months after the ship had sustained the sea damage for which the claim upon the underwriters is made.

In the arguments the counsel for the appellant complicated the question by introducing the consideration of the conduct of the plaintiffs with reference to the policy on the ship, as bearing upon their rights under the policy on freight. It appears to me that this cannot properly be done in this case, where the injury to the ship was practically not reparable. The contracts [155] are entirely independent of each other, and between different parties. The rights and liabilities under the policy on freight ought to be determined without reference to what may have been done, or omitted to be done, by the assured on a policy on the ship upon which his rights under that policy may depend.

A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight. Under this policy, it seems to me that the only question is whether, by the perils of the sea, the ship was so damaged at New Zealand, during the term of the policy, as to be rendered incapable, unless sufficiently

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repaired, of performing the voyage from Calcutta to England, for which she was chartered. Upon that subject it appears, from the admission to which I have already adverted, that the sea damage was such as would have justified an abandonment and claim for a constructive total loss. By this I understand that the amount of damage was such that a prudent uninsured owner would not have incurred the expense of repairing the ship. And this appears clearly from a farther admission stated in the report of this case in the Court of Common Pleas (¹), viz., that the cost of repairing the vessel at Calcutta, so as to make her seaworthy for carrying a cargo to England, would have exceeded the value of the ship when repaired, plus the difference between the chartered freight and the current freight, which would amount to about £450. No prudent man would, in such a state of things, incur the expense of repairing the ship; and the ship-owners electing not to repair were entitled to consider the charter at an end, and the chartered freight as totally lost by a peril of the sea.

Secondly: The next question to be considered is, whether the assured can recover against the underwriters without a notice of abandonment. The counsel for the appellants argued that by the law of marine insurance a notice of abandonment is in every case required, just as by the law merchant notice of dishonor is upon bills of exchange. The rule as to abandonment seems to be that which was referred to by Mr. Justice Blackburn, [56] as contained *in Mr. Phillips' book on Insurance, sect. 1491, where he says: "An abandonment being a transfer, it can be requisite only where there is some assignable transferable subject on which it can operate. When nothing remains to be assigned or transferred an abandonment is useless and unnecessary." It must be observed that "abandonment" and "notice of abandonment" are two distinct and separate things, though they are frequently confounded together in expression.

Where a notice of abandonment is given it is conclusive proof that the assured intends to claim from the underwriters for a total loss; and then the assured must (as Lord Cottenham said in *Stewart v. Greenock Marine Insurance Company* (¹), "give up to the underwriters all the remains of the property recovered, together with all the benefit and advantage belonging or incident to it; or rather" (he adds) "such property vests in the underwriters."

But although an abandonment or cession must be the necessary result of every claim for a total loss, it does not follow that notice of this abandonment must always be given to the underwriters before a total loss can be claimed.

(¹) Law Rep., 5 C. P., 351.

(¹) 2 H. L. C., 183.

It was argued at the bar, on the authority of the case of *Knight v. Faith* ⁽¹⁾, that in every case where the subject matter insured exists in specie, though in a damaged state, a notice of abandonment is necessary to entitle the assured to make a claim as if it had been actually destroyed. This was the opinion expressed by Lord Campbell in delivering the judgment of the court in that case. The necessity for a notice of abandonment was not considered upon the first argument, but the court desired to hear the case farther argued on the question whether, under the circumstances of the case, the plaintiffs could claim for a total loss without giving notice of abandonment. It seems to have been quite unnecessary for the determination of the case to introduce this question, because the circumstances were such that the assured could not have been entitled to recover for a total loss if he had given the most timely and sufficient notice of abandonment. Lord Campbell had before, in the case of *Fleming v. Smith* ⁽²⁾, stated the rule as to notice of abandonment in the *same unqualified terms, saying: "According to all [157] the old authorities, a constructive total loss can only entitle the owners to recover as for an actual total loss, by a notice of abandonment."

It had been previously decided by the Exchequer Chamber, in the case of *Roux v. Salvador* ⁽³⁾, that notice of abandonment was unnecessary where it could be of no use to the underwriters, who, in that case, if they had received notice of the loss, could have exercised no control over the goods insured, nor by any interference have altered the consequences. The case was an action upon a policy of insurance upon hides from Valparaiso to Bordeaux. On the voyage the hides were found to be in a state of putridity, occasioned by a leak in the ship, and they were sold for a fourth of their value at Rio Janeiro. The assured received the news of the damage to the hides and of their sale at the same time. The Court of Common Pleas ⁽⁴⁾ gave judgment for the defendant, the underwriter, on the ground that the assured could not recover as for a total loss without a notice of abandonment. But this judgment was reversed in the Court of Exchequer Chamber; and Lord Abinger, in a very elaborate and carefully considered judgment, laid down the principle as to notice of abandonment when an assured claims for a total loss and part of the subject insured remains in specie, that notice is only necessary to be given where upon receiving it the underwriters could do something in the exercise of their right over the salvage. In that case, the assured receiving the news of the damage to the hides and of the sale of them at the same time,

⁽¹⁾ 15 Q. B., 649.

⁽²⁾ 1 H. L. C., 535.

⁽³⁾ 8 Bing. N. C., 266.

⁽⁴⁾ 1 Bing. N. C., 526.

a notice of abandonment to the underwriters would have been idle and useless.

In *Farnworth v. Hyde* (¹), under similar circumstances of the loss of the ship insured, and of her sale having reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment. This seems to place the rule as to notice of abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or alter their position.

Upon this ground, therefore, I am of opinion that there was 158] no *necessity for the assured in this case to give notice of abandonment of the chartered freight to the underwriters. Mr. Justice Willes, in delivering judgment in the Court of Common Pleas, apparently adopting the rule as laid down in *Knight v. Faith* (²), said: "The general rule of insurance law applies, that where the thing exists in specie (and here the thing insured, viz., the chance of earning the freight, did survive the risk) and can be restored, though at an improvident expense, in order to make a total loss there must be an abandonment." But I am at a loss to understand what chance of earning the freight can be said to have existed after the ship *Sir William Eyre*, mentioned in the charterparty, had sustained such sea damage as to render her incapable of performing the voyage by which the freight was to be earned, and had become at the election of the owners a total loss. The underwriters could not have substituted any other ship, and tendered her to the charterer in performance of the charterparty on the owner's part.

It was suggested in argument that the underwriters on freight, if they had had timely notice of abandonment, might have arranged with the underwriters on ship to repair the ship at their joint expense, and have sent her on to Calcutta, and tendered her to De Mattos in fulfillment of the owner's contract. But this is the suggestion of a mere possibility, and contains in it nothing practical, nor can it reasonably be taken into account in judging of the rights and liabilities of the parties. I have no difficulty in coming to the conclusion that there was no necessity for any notice of abandonment of the chartered freight to the underwriters on freight.

Thirdly: This being my opinion, it seems to me wholly unnecessary to consider whether the notice of abandonment which was given was given in time. The rule is, where notice of abandonment is necessary it must be given in a reasonable time after information of the damage which has occurred to the subject of insurance. Whether sufficient notice was given depends

(¹) 18 C. B. (N. S.), 885.

(²) 15 Q. B., 649.

upon the facts of each particular case, and the decision upon one case can be no authority or guide upon any other. I must therefore decline to express any opinion with which of the learned judges I should be disposed to agree upon this question.

*Fourthly: There only remains to consider the question [159 whether the conduct of the owners of the ship after the damage she sustained was such as to discharge the underwriters on freight. Upon this I have already incidentally made some observations. It is unnecessary to examine in detail the various acts by which it was contended that the owners had elected to retain the ship, and to come upon the underwriters merely for a partial loss. I think that they had precluded themselves by dealing as they did with the ship, and also by delaying so long their claim for a total loss. But I do not see how the conduct of the shipowners, however it may affect their rights under one contract, can have any influence on their rights and the liabilities of another party under a separate and independent contract. If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and put into a condition to earn the freight, and the shipowners had declined to take this course, they would have lost the freight not by the perils of the sea but by their election. But the damage being such as to render the repair of the ship practically impossible, the question between the assured and the underwriters on freight must be regarded as if there were no policy on the ship; and then it becomes the simple consideration whether the freight was not totally lost by the perils of the sea, by what must be regarded, in relation to it, as the total destruction of the ship by which it was to be earned.

I think that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD COLONSAY: My lords, this case appears to be attended with a great deal of nicety. It is novel, too, in its circumstances. Indeed, the policy here is peculiar, and the consequence has been that there has been a great deal of difference of opinion among the judges, and a *great expenditure of ability and [160 of ingenuity in discussing the question. It appears to me that a good deal of that has been expended in consequence of mixing up together things which are substantially separate. I think there are two questions, or rather, perhaps, only one, namely,

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whether the freight was lost by reason of the perils of the sea insured against; and I think that that question must be considered altogether separate from the question of an insurance by other parties upon the ship. Now, notwithstanding that one of the learned judges, of whose assistance we have had the benefit, and for whose opinion I entertain the highest respect, has expressed the opinion that the loss was not caused by the perils insured against, but by the inability of De Mattos to furnish a cargo, I am compelled to differ from him. It appears to me that, upon the admission contained in Article 24 of the case, we are to hold that the condition of things within the period to which the insurance applied was such that the vessel was in a condition in which an abandonment might have been made as for what is called a constructive loss; that is to say, that she was not in a condition to be worth repairing. If that be so, I think that the liability then attached, and that the risk having been incurred, and the peril having been sustained, and the vessel having been rendered incapable of earning the freight by reason of that damage done at sea or in port within the period insured against, that terminated the question. No doubt it was not then ascertained what the damage was, but it was afterwards ascertained that that damage was sustained within that period, and that must be treated as an admission in the case.

Now, I do not see how the matter of De Mattos having failed in the month of December, and having been unable to supply a cargo, or having declined to supply a cargo, is a matter which can be said to be the cause of the loss of the freight. Something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes; but I think it is very clear that, before De Mattos failed, the ability to earn the freight was gone by reason of the perils insured against having happened, and that appears to me to be sufficient. De Mattos was under no obligation, it is said, to furnish a cargo, because of the delay of the owners of the vessel [161] to tender the vessel. I think De Mattos was *under no obligation to furnish a cargo, unless there was presented to him a vessel fit and sufficient to carry that cargo to Britain, and that was the failure that occurred. There was no vessel fit and sufficient to carry the cargo to Britain presented to De Mattos, and that was a state of matters that occurred before the vessel arrived at Calcutta.

The only other question is the question as to the notice of abandonment. I think that throughout this matter we must consider this case as if there had been no insurance upon the ship. If there had been no insurance upon the ship, what what would have been the object of the notice of abandon-

ment, or what was to be gained by such a notice being given? I do not see, after what has occurred, what the underwriters on the freight could have done. The vessel was not fit to be repaired. They could not have compelled the owners to repair her when she was not worth it. What was to be gained, then, by the notice of abandonment being given? It is true there was a puzzle raised by some of the judges as to who would have been the party entitled to the freight, and, therefore, the party who would have been entitled to the insurance upon the freight, if the vessel had been timeously abandoned, and had been repaired, and freight had been earned. But, my lords, I do not think that there is really any puzzle in the case at all. At all events, it is clear that if the freight had been earned, there would have been no loss of the freight, and a different condition of matters would have arisen. The question as to the right to demand the insurance if the vessel had been lost is a different question altogether. The only party who had a right to demand the insurance is the party who effected it; and if there had been no insurance upon the vessel, that right would equally have existed with regard to the freight. I therefore think there is really no substantial ground for this question as to the notice of abandonment; and until there is more decided authority adduced upon the subject, I am not prepared to receive the doctrine that notice of abandonment in a matter of this kind stands upon the same mercantile footing as notice of dishonor of bills of exchange. The reason of the thing, in my apprehension, is against that doctrine. I think that the reason of the thing tells us that where there is nothing substantially to abandon to the party to whom the *notice of abandonment is given, and he could gain [162 nothing by it, then it is not necessary to give that notice. Therefore I think that all that puzzle which has arisen from the circumstance of there being an insurance upon the vessel is quite out of the question when you come to consider purely the liability of the underwriters upon the freight. In this case it appears that there was no timeous notice of abandonment, or no notice of abandonment at all, according to a judgment elsewhere; and therefore in that view also the question would not arise. But I think the real question is, whether the right to freight was lost by the perils of the sea during the period embraced in the policy of insurance. I think it was, and I think the liability attached, and I see nothing afterwards to relieve the parties from that liability.

LORD HATHERLEY: My lords, in this case, which is slightly complicated in its details, we are extremely obliged to the learned judges who have assisted us by giving us their opinions,

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and we are also indebted to the learned counsel at the bar for thoroughly sifting it that, like many other cases which appear complicated and difficult on the first blush and opening of the matter, those difficulties are cleared away and the whole matter reduced to very simple principles when there has been a thorough discussion of the subject.

My lords, the case is really now brought simply to this. The owner of a ship under a certain charterparty arranges that his vessel, being about to proceed to New Zealand, shall, after her voyage thither, and after a certain delay there, proceed to Calcutta and take on board a cargo from one De Mattos, he having, in the first instance, entered into that undertaking with him. When she arrives at Calcutta she is to be tendered to De Mattos for the purpose of receiving the cargo to be so provided, and she must then be in a condition sufficiently staunch, tight, and strong for the purpose of her voyage from Calcutta to England, or rather Great Britain, in order to earn the freight that will then be due from De Mattos in respect of her so having conveyed his goods. This being the entire course of the vessel's proceeding, the owner is minded to insure himself against the perils of the sea, in two respects, first, as regards the vessel, and 163] secondly, as regards the *freight to be earned between Calcutta and England. I mention this because there can be no reasonable doubt (indeed the learned judges said they hardly thought it right to consider the question as it was not raised) that, however peculiar the form of this policy may be (and it is of a somewhat unusual form), there is nothing to prevent any person, during the whole course of the voyage, insuring against the perils of the sea during any part of that voyage, whether the perils of the sea may occur during that part of the voyage as to which the ship is insured, or whether the chance of loss against which insurance is effected may be the chance of her being so damaged in the anterior part of the voyage as not to be able to fulfill the subsequent part of her voyage (in respect of which part of the voyage itself she is not insured), and in consequence of being unable to fulfill the subsequent part of the voyage she cannot earn the freight which is insured.

I think one of the learned judges, who has given a very valuable and able judgment in this case, though I do not agree with him, Mr. Baron Martin, seems to have thrown out some slight doubt as to whether or not the mode of effecting this policy was one that could be sustained. But he dwelt but lightly upon that point, and I need say no more upon it, because no authority was cited for saying that the insurance which was effected was in any way contrary to the law of insurance. The insurance effected was simply this: the vessel was to proceed to

New Zealand. During the whole period of her voyage thither, and of her stay there for thirty days, she is not says the policy, to be injured or damaged by perils of the sea to such an extent as to prevent her being staunch, tight, and strong enough on her arrival at Calcutta to take the expected cargo to England. That is the undertaking which is given by the policy, and that is the risk which is insured against. It is clear and plain, from the admissions in this case and the evidence that has been given, that she was injured during the period insured against, that is to say, she was injured just about the time of her arrival at New Zealand, and while she was in the neighborhood of Bluff Harbor. She was injured to such an extent that, although at Bluff Harbor it could not be ascertained what the extent of the injury was, and although at Dunedin a certain amount of repair was effected which enabled the vessel to proceed to Calcutta, *she [164 was not staunch, tight, and strong enough for the voyage to England when she arrived at Calcutta, and her being in that condition was wholly due to the injuries she had sustained during the insured period.

It is farther admitted in the case that the injury was of such a character that no prudent owner would have repaired her for the benefit of the contract which had been entered into as to freight, because, in order to make those repairs, it would have been necessary to expend more than the whole value of the ship; in other words when it was ascertained what the extent of the injury was, it was found that she was in such a condition that, had the owners been minded to abandon her at the time when the injuries were sustained to those who had taken the policy on the ship (and who must be distinguished from those who had taken the policy on the freight which is now before us), they would have been justified in so doing. As between the owners and those who insured the ship itself there might arise a question, and indeed there did arise a question, which was determined, I think, in the action against Campbell, as to whether or not they had given timely notice of the abandonment of the vessel to those who had insured her, or whether by their conduct in delaying her voyage to Calcutta for a very considerable time, by their employing the ship in the meantime to a certain extent as a store-house for coals, and by taking other steps which occasioned great and possibly unnecessary delay in New Zealand before giving notice of abandonment, they had put themselves in such a position, as respected those who had insured the vessel, as to have lost their right of abandonment. But that matter appears to me, I confess, as it seems to have done to your lordships who have preceded me, to be wholly immaterial as regards the question before us in respect of the

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insurance on the freight. When the vessel came to Calcutta it appears that there was (and this was somewhat relied upon), in the first instance, an actual tender of the vessel to DeMattos, but it was found that DeMattos had become insolvent, and those who represented him, the assignees of De Mattos, declined to furnish any cargo. All this took place before there had been a thorough examination of the amount of the injury in Calcutta. When a thorough examination took place afterwards the result [65] was what I have described, that no prudent *owner would have thought of putting her into a condition to continue her voyage to Great Britain.

That being so, it appears that every element of the contract with the underwriters upon the freight is brought out in a clear and distinct light, showing that the liability of the underwriters on the freight had actually accrued, unless indeed the question that has been raised with respect to the notice of abandonment as applying to the insurance of the freight should prevail with your lordships. The ship had undoubtedly been insured during the period when the injury was sustained. The ship undoubtedly, in consequence of that injury, was unable to perform the voyage, and could not therefore be tendered in the condition in which she ought to have been tendered to De Mattos, and therefore the freight was lost in consequence of that injury. I will postpone for the moment the consideration of the question of De Mattos' insolvency.

Putting the question aside as to how far De Mattos' insolvency may be regarded as the proximate cause of the loss of freight rather than the damage sustained by the ship in the anterior part of the voyage, there comes the question, was it or was it not necessary to give a notice of abandonment in this case, and if necessary, was it given in time?

As regards the necessity for giving notice of abandonment, I think that is the point that was most vigorously pressed upon us by the counsel for the appellant, who relied upon some *dicta* of Lord Campbell upon the subject, and contended strongly that it was necessary in all cases whatsoever of a claim upon underwriters as for a total loss upon a policy, for the owners to give notice to the underwriters of abandonment of the thing insured, whatever might be the circumstances or the position of the insurers or the insured, and whether in truth any advantage could possibly be made of that notice of abandonment or not. It was put upon this ground, that it was rather for the underwriters to say in their judgment what advantage they might be able to derive from that notice of abandonment so given in regard to their position on their policy. I apprehend, my lords, that certainly no authority has been cited to show

that this notice of abandonment is to be considered necessary in a case where no such advantage could possibly *accrue [166 to the underwriters. If the vessel be not really wholly lost, if it be only a constructive total loss, as it is termed (though that is perhaps not a very happy phrase), occasioned by the impossibility of effecting repairs, the cost of which will not exceed the whole value of the ship when repaired, then there being something *in esse* to be handed over to the underwriters, it is necessary that they should be informed of this in order that they may have an opportunity of making the best use they can of what remains — of that which the owners give up, in electing to make that a total loss which is not in fact a total loss, there being something in the nature of salvage, or fragments, or wreck, or something of that kind, which may be of value to the underwriters, although not of any to the owners. But in this case there is nothing suggested, and nothing can be suggested (except one single point which I will notice in a moment), as to any advantage that could have been derived by the underwriters from any such notice of a constructive total loss being given to them on the part of those who had insured.

The only exception is, that it is suggested that they might have said, “true it is, we insured that this freight should be earned, and certainly that earning depended upon the arrival of the ship at Calcutta in a condition to earn it. She did not arrive at Calcutta in a condition to earn it — it would have been folly to expend money in repairing the ship, which would have exceeded the value of the ship when repaired; but if you had told us that you were about to claim as for a total loss in respect of this freight, we should have been in this position: we should have found that you had insured the vessel; the underwriters on the vessel would have been in an equally disadvantageous plight with ourselves, having a heavy demand upon them in respect of their insurance, and we two together might have been minded to make such an arrangement each with the other that, regard being had to what we each should have to pay upon our insurances, it might have been worth our while to put the vessel into a state to earn the freight.” Those who had insured the freight could not tender any other vessel. That question does not arise in the peculiar insurance we have before us, because it was an insurance of freight to be earned by the *Sir William Eyre* and by no other vessel. *De Mattos* of *course [167 might have refused any other vessel than that; it could not be earned therefore by tendering any other vessel. It is supposed that if the underwriters on the freight had had timely notice, they might have made such an arrangement with the underwriters

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on the hull or the vessel herself as would have saved a total loss accruing.

I apprehend, my lords, that that is much too remote a contingency to render it necessary for the insured to give the insurers notice of abandonment upon the principle which I have before referred to, namely, of their being able to save something out of the wreck. It is not necessary to illustrate that, but it might be shown in a variety of ways how such a doctrine as that would carry the necessity of notice to the remotest extent in respect of bargains which might be made by persons who might or might not be interested at the moment in the ship, such as persons who might purchase the damaged vessel, or the wreck, or the like. Numerous arrangements might be made of that kind, which would create, I apprehend, far too remote an interest to be considered upon a question as to the law requiring notice of abandonment to be given. The whole principle of the notice of abandonment is, that you are to place the underwriters in such a position that they shall have all the advantage which you now possess in respect of the vessel, supposing that they can make those advantages available for the purpose of effectuating a salvage of some portion of that which had been lost in consequence of the perils which they have insured you against.

Now, my lords, with regard to the observations made by Mr. Baron Martin, that the loss really was not a loss by perils of the sea, but was due to the insolvency of De Mattos, I think there is a clear fallacy in that view in two points, the first of which has been noticed by my noble and learned friend who first stated his views upon this appeal; it is, that the loss had accrued before the insolvency of De Mattos occurred. The loss accrued when the accident happened in which the damage occurred at Bluff Harbor, and that was some time before the insolvency of De Mattos took place. But I do not think it necessary to rest it upon that. I apprehend that it is not a thing which would absolve the underwriters from the liability for the loss which undoubtedly accrued on account of *the ship not being fit for the voyage. There is nothing to absolve them from the liability to pay the insurance in the circumstances of the insolvency of De Mattos, who in the chapter of accidents might have become solvent, and even wealthy again, before the necessity arose for the vessel completing her voyage. But the point that has to be looked at is this — were the owners in a position to enforce their rights against De Mattos, whatever they may have been; were they in a position, by tendering the vessel to him, either to insist upon his paying the freight then and there, or to insist upon such rights as might accrue to them by action in respect of his non-performance of the contract; or were they disabled

from occupying that position by the consequences resulting from the perils of the sea which arose at Bluff Harbor, preventing them from fulfilling their part of the contract with De Matos by tendering to him a ship, staunch, tight, and strong, for carrying his goods to Britain? If that be the case, of course it is clearly and distinctly within the terms of the policy; and that being so, it seems to me clear that the underwriters must be liable, unless this one point, which was strongly insisted upon, of want of timely notice of abandonment, precludes their liability. I think your lordships are all agreed that no such notice was necessary, and therefore it is unnecessary to consider the question as to the time at which such notice was given.

Therefore, my lords, upon all the points, I think that the appellants have failed, and consequently the appeal should be dismissed with costs.

*Judgment of the Court of Exchequer Chamber affirmed;
and appeal dismissed with costs.*

Lords' Journals, 5th May, 1873.

Attorneys for appellants: *Field, Roscoe, Field, & Francis.*

Attorneys for respondents: *Thomas & Hollams.*

SCOTCH APPEALS.

[Law Reports, 2 Scotch Appeals, 273.]

Feb. 14, 1873.

273] *JAMES GOWAN Appellant; B. CHRISTIE, and MRS. CHRISTIE Respondents.

Obligations of a Mineral Lease.

When the thing let turns out to be a nonentity, the lessee is not bound.

Per THE LORD CHANCELLOR: In such a case it is perfectly reasonable that the lease should be subject to reduction.

Per LORD CHELMSFORD: Where there is a total destruction or exhaustion of the subject matter of a lease, the lessee is entitled to abandon it.

Perils of the Lessee.

Per THE LORD CHANCELLOR: The lessee of a mine, although entitled to rely on the existence of the subject matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted.

Unworkability to Profit.

At common law, the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely.

Difference between Mineral and Agricultural Leases.

Per LORD CAIRNS: What we term a mineral lease is really a sale out and out of a portion of the land. *Dicta* therefore applicable to agricultural leases are not always applicable to leases of minerals.

THE question in this case turned on the obligations of a mineral lease; the tenant under it urging that, by reason of the sterility or exhaustion of the subject matter, he ought to be discharged from his contract, as the premises, he alleged, were unworkable to profit, even though no rent should be exacted.

The appellant commenced his action in May, 1870, for reduction of this lease, which had been granted to him in February, 1866, "of the freestone and minerals, and all materials and substances of what nature soever lying in and under certain lands" (in the pleadings specified), "with power to search for, work, win, and carry away the said materials and substances," at a rent of £200 per annum; the lease being for twenty-one years; but with a stipulation that no rent should be exacted for the first year, and with power to the lessee, at the end of the third, seventh, and fourteenth years, to determine and put an end to the lease.

The grantor of this lease was the late Mr. Alexander [274 Christie, of Baberton, who on his death, in August, 1868, was succeeded by his brother, as heir of entail of the estate. The suit, therefore, was directed against the brother, and also against the widow of the deceased, as his sole representative in movables, and also in heritage, other than the entailed estate.

The appellant's condescendence stated that he had been induced to accept the lease by the recommendatory descriptions of the grantor, his agents, and factor, to the effect that it was thoroughly capable of being worked to profit. In February, 1870, the appellant took possession, and commenced his operations "by boring and otherwise;" but, according to the condescendence, he soon discovered that there was "no freestone, or other mineral, or material in the lands, capable of being worked to profit."

The respondents, on the other hand, denied the appellant's allegations, and insisted that "the freestone in the said lands was workable to profit."

The lord ordinary ⁽¹⁾ found that the appellants' assertions of misrepresentation were not sufficient in law to support the conclusions for reduction of the lease. But as to the allegations respecting "unworkability to profit," his lordship allowed a proof, adding the following explanatory note:

The pursuer avers that he entered into the lease under essential error, induced by the representations of the late proprietor of Baberton, and of his agents and factor. These representations, it is said, were to the effect that there was a large stratum of freestone in the lands of Baberton proposed to be let, that it was of superior quality, and that it was capable of being worked to profit by a tenant. It is not averred that the representations were false and fraudulent. The pursuer's statement is only that there is "no such amount of freestone as was represented to him." The capability of the freestone of being worked to profit depends on many contingencies. It is averred by the pursuer that he was not, at candlemas, 1869, that is, after three years' possession and trial of the freestone, satisfied that there was no such freestone in the lands as had been represented to him, and that he accordingly did not avail himself of the break in the lease at that term, but continued his operations, although the next break did not occur until candlemas, 1873. The present action was not raised until fifteen months thereafter, that is, until after the pursuer had been upwards of four years in possession of, and working the subject of the lease.

The respondents reclaimed to the Inner House (first division), and the appellant obtained leave to amend his pleading, by adding "to the words 'capable of being worked to a profit [275 in a mineral lease,' the words 'even if no rent were to be paid.'"

The Inner House (first division) recalled the lord ordinary's interlocutor, whereby he had allowed evidence to be gone into as to the allegation of "unworkability to profit;" the Inner House holding that there was no legal relevancy in the appellant's averments, and that they were wholly insufficient to jus-

(1) Lord Mackenzie.

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tify the prayer of his summons ⁽¹⁾. Against this judgment the present appeal was tendered to the house of lords; Mr. Pearson, Q.C., and Mr. Taylor Innes, of the Scotch bar, being of counsel for the appellant. Their argument, and the authorities cited, are fully dealt with in the opinions of the law peers.

The *Solicitor-General* ⁽²⁾, and Mr. Glasse, Q.C., were not called to address the house ⁽³⁾.

The following opinions were delivered by the law peers:

THE LORD CHANCELLOR ⁽⁴⁾: My lords, in this case, by allowing proof before answer, the lord ordinary did not decide the question of relevancy; but, on the reclaiming note, the Inner House found that there was no relevancy in the appellant's averments; so that the real question now is, whether the Inner House was right or wrong in so deciding.

The burden of proof undertaken by the appellant is certainly a very heavy one; yet Mr. Innes did not shrink from the principle involved in the form of remedy which is sought. He said that, in the view of the law, there was nothing at all to be leased, That was a startling proposition, looking at the instrument, and considering the nature of the subject matter which it comprehends, namely, all the minerals and materials under particular lands, freestone being specially but not exclusively mentioned, and all other minerals of whatsoever kind they might happen to be. The principle of the argument was, that by the Roman law, adopted into the law of Scotland, there is a warranty im-276] plied or expressed *(I do not know which it may be, but that there is certainly a warranty in one way or the other), of possession of a subject capable of producing the contemplated fruits or profits.

Now, in one point of view, such a doctrine may be, and I venture to say is, perfectly intelligible and perfectly reasonable. When there is that which, in the language of the law of this country, would be called a total failure of consideration — when the landlord has not the thing to let which he purports to let, and which is the consideration for the rent, it is perfectly reasonable that the whole lease should fail *ab initio*, and be subject to reduction. Nor is it a very wide extension of that principle to say that if a landlord warrants a continuation of the subject matter for a certain number of years, a total failure of the subject matter before that number of years has elapsed shall involve a reduction or termination of the contract at the time of that failure and thenceforward. Those views are perfectly intelligible. But they all resolve themselves into either the original

⁽¹⁾ Court of Session Decisions, 3d series, vol. ix, p. 485.

⁽²⁾ Sir George Jessel, Q.C.

⁽³⁾ The case is fully reported in the 3d Series, vol. ix, p. 485.

⁽⁴⁾ Lord Selborne.

non-existence or the subsequent exhaustion or failure of the subject matter. And when the authorities which have been referred to are considered, they will be found, with a few, if any, exceptions, to turn entirely upon that principle so understood. The Roman text, *si frui non liceat* ⁽¹⁾, points at cases where possession is not given; where there is no prestation of the subject matter, or where some external *vis major*, not inherent in the subject matter, and not the fault of the tenant, takes the subject matter away, either temporarily or permanently; but the principle is always the same, resting on the destruction *pro tanto*, or entirely, of the subject matter. But Lord Stair ⁽²⁾, the authority on the law of Scotland chiefly relied upon, goes further, and, as it seems to me, lays down the true principle in the most unequivocal terms. He says that there is a peril or risk undertaken by the lessee, that he is at the risk of the quantity and the value of the subject matter, but he is not at the risk of the being or existence of it.

If there had been in this case a lease of some particular description of minerals only — for instance, of a bed or seam of [277 coal, or of a bed of freestone — and if there had been no such thing in existence, then, according to Lord Stair's principle, the tenant would not have been at the risk of the "being or existence" of the coal or the freestone. But that, of course, cannot apply to a case where the lease is of all minerals; for although there is necessarily some uncertainty and speculation in such a lease, because the minerals may turn out to be of greater or less value, yet some minerals there necessarily must be under every parcel of land, and therefore the peril of the "being" of the minerals is a peril which no tenant of such a mineral lease incurs; nor does the landlord incur it either. But with respect to the quantity and value, which is the whole matter in controversy here, as I understand the case, according to Lord Stair's doctrine, the whole peril of the quantity and value is under such circumstances upon the tenant; so that that authority is directly against the appellant's case.

Then we are referred to Lord Bankton, who in the passages quoted seems to say that the landlord warrants a capacity to produce fruits ⁽³⁾. What is the meaning of that? A capacity to produce the kind of fruits which, according to the substance of the contract, the tenant is to receive. What are the fruits within the meaning of that principle? If, for instance, land is let as good arable land, and it turns out to be totally incapable

⁽¹⁾ Dig. 19, 2, 15, 1: *Ex conducto actio conductori datur, si res quam conduxit frui ei non liceat*. In the Roman law mines and quarries are uniformly

spoken of as yielding *fructus*. Dig. 7, 1, 9, 1; *Ibid*, 24, 8, 8.

⁽²⁾ Book 1, t. 15, s. 2, under the heading of Location and Conduction.

⁽³⁾ Vol. i. 20, 13, 14; vol. ii. 2, 9, 24.

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of any agricultural produce, I can understand that in that case the principle might apply, and that there is a failure of the warranty to produce fruits. Again, I can understand that if, in the case of a mineral lease, the laudlord, in substance, represented that there was workable coal, and the coal turned out, as in the case of *Murdock v. Fullerton* ⁽¹⁾, to be so nearly exhausted that there was no area of the least value for working — in other words, nothing which could be worked — a thin seam, for example, of a finger's breadth — something which was not practically useful for the purpose of working at all — it may be said that in such a case there was a failure of the landlord's warranty. But the fruits in this case are minerals to be got by working, and according to Lord Stair the quantity and the value of them, if they can be got by working, are at the risk of 278] the tenant. If the minerals can be got, there are the *fruits, and there is no failure whatever of fruit in such a case. There is no sterility as long as there are minerals which may be got.

The case of *Edmiston v. Preston* ⁽²⁾ would be regarded at the present day as turning upon a thing for which the tenant was responsible. But the principle upon which that case was decided was evidently the same as if an earthquake or some natural convulsion had made the mine practically unworkable.

The case of *Dixon v. Campbell* ⁽³⁾, as far as it is fit to refer at all to an authority turning upon contract and not upon general law, is strongly against the appellant's argument, because in that case, there being an express contract that if the mine should cease to be capable of being worked to advantage by reason of that class of accidents which all these authorities contemplate, the tenant might throw it up, it was expressly laid down that he could not throw it up for a failure which did not occur in the mine, but in the profits, on account of the variations in the market price. What has arisen in the present case but a question of market price?

The third article of the condescendence tells us that there is freestone under the lands of Baberton, and that four years were occupied in boring and in other operations to obtain it. I pass over the allegation that the quantity is less than was represented, for nothing now turns upon that. The appellant goes on to say: "Nor is the said freestone, or any other mineral, or material, or substance in the lands so let, nor are all of the said substances together, capable of being worked to a profit in a mineral lease even if no rent were to be paid." I will stop reading that sentence there, because I agree with Mr. Innes that he does not take issue merely upon the point which follows, that the min-

⁽¹⁾ Feb. 12, 1829. 7th Series, p. 404.

⁽²⁾ 2 Shaw's Appeals, 175.

⁽³⁾ Morr., 15, 172.

erals are incapable of being remunerative at the rent stipulated for in the lease. He also says that even if no rent were to be paid they are not capable of being worked to a profit. He goes on: "The pursuer has tried the said lands at all points showing indications of freestone, but he has in every case been unable to turn out such a quantity as would repay his outlay, even upon the most economical methods which can be used for the efficient working of minerals." That allegation is consistent with the existence of an unlimited quantity of minerals capable of being *worked and finding a market—but what he [279 says is that they are not capable of being worked to a profit—that so far as he has worked he has been unable to turn out such a quantity as would repay his outlay.

Therefore, the proposition really is this, that according to the principles laid down in the Law of Scotland the landlord guarantees the tenant against loss by reason of any of those elements extrinsic to the mine and independent of the nature of the subject matter within the mine which go to the determination of the question of profit and loss. What are those elements? The quantity, the quality, the cost of labor, the cost of materials, the demand and supply varying in the markets, the accessibility of the markets themselves, and the means of conveyance—all which are things entirely extrinsic to the mine, and certainly not within the view of the principle laid down by any of the authorities to which a reference has been made. On the contrary, they are exactly those things as to which Lord Stair has said that the tenant runs the "risk of quantity and value."

My lords, it therefore appears to me that even the authorities relied upon by the appellant are against the view of the law which he suggests. But when we come to look at the stipulations in this particular lease we find that conclusion fortified by those stipulations. It is admitted that it is a very common thing with parties entering into mining leases to contract expressly that the tenant shall not be obliged to go on with the lease when he cannot work the mine to profit, and the parties very wisely add a clause providing for an arbitration. There is nothing of that sort in the lease before us, but there is a provision that at the end of three years, or at the end of seven, or at the end of fourteen years, the tenant may "break," as it is called, or throw up the lease; a provision absolutely irreconcilable with the whole principle of the appellant's argument; because if the lease was vitiated from the beginning, and liable to reduction, it must have been upon grounds which are wholly independent of the exercise of an option at certain periods to retain or to throw it up. I had really great difficulty in under-

standing whether it was seriously meant to be contended, that because the lessee had made no profit he would not only have a right to throw it up, but he would also have a right to repayment of the rent he had paid. That seemed to me to be almost a necessary consequence of the appellant's argument, although utterly inconsistent with the whole intent and purpose of the express contract between the parties. On these grounds, my lords, I am of opinion, that the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD: My lords, I entirely agree with my noble and learned friend. The law, as laid down by Mr Bell (*), makes it quite clear that where there is a total destruction or exhaustion of the subject matter of a lease, there the lessee is entitled to abandon it. But I am not aware that where it is a case of sterility merely, the tenant has any such right. The old authorities upon the subject rather, to my mind, indicate directly the contrary.

A distinction has been taken between agricultural and mineral leases, upon the ground that a lease of minerals is a hazardous speculation; and Lord Deas (†) says, that he knows no case where a mineral lease has been brought to an end upon the ground of sterility.

Here the appellant has fenced himself round against the possibility of loss by reason of the sterility of the subject matter. He stipulates that for the first year no rent whatever shall be payable. He then stipulates that upon giving six months' notice at the termination of the third, the seventh, and the fourteenth years respectively, he may without any cause assigned abandon the lease. Now this is entirely for the benefit of the tenant. The landlord has no corresponding right of giving notice and turning the tenant out of possession. Therefore it seems a most reasonable thing to hold that where a special contract of this description is entered into (even supposing the common law would give the right of reducing the lease, which I am quite certain from the authorities it would not) it is impossible to say that the tenant can be fairly and reasonably entitled to reduce the lease, even supposing circumstances existed which without a contract would have entitled him to do so.

281] ***LORD COLONSAY:** The question is, whether the appellant has presented such a statement as entitles him to be relieved from the contract, in respect of the fact he cannot work these minerals to profit. I am not aware of any case in which that has been decided in regard to a mineral lease. All the cases, without exception, which have been put before us are

(*) Principles, sect. 1208.

(†) 3d Ser., vol. ix., p. 490.

cases substantially of the non-existence or exhaustion of that which had been the subject of the lease.

Now in this case the tenant has fenced himself round with protection as to any kind of occurrence that can take place. He did not stipulate for relief by means of a reference to arbitration. But he protected himself, as if he had no basis of common law to rely upon, by conditions which enabled him to break the lease at the end of three, seven, or fourteen years. I think the court below has taken the right view in looking at what was in the contemplation of the parties, the contract being in every respect favorable to the tenant, who, in my opinion, has shown no ground for the relief which he now seeks.

LORD CAIRNS: This case is at once an example of an attempt to make use of a suit for the purpose of obtaining relief upon a ground which was not in contemplation at the time when the suit was commenced, and of an effort to strain a well known principle of law to a purpose to which that principle was never intended to apply.

The whole foundation of this suit originally was an allegation that there had been a specific representation, and an express warranty given by the lessor to the effect that there was "a large stratum of freestone in the lands proposed to be let, of a superior quality, and capable of being worked to profit;" there being no reference whatever to any implied warranty in law. The second article of the condescendence states that, "on the faith of these representations, and in and under an essential error as to the subject of the lease," the appellant signed the lease in question.

These averments are now altogether out of the case, and we have an attempt to make out, that although there was no specific and express warranty, there is a law in Scotland which implies warranty to the same effect.

*My lords, it appears to me that the observations of the [282] lord ordinary in dealing with the question of express warranty and representation are very applicable also to the question of warranty implied by law. The lord ordinary remarks that such representations "are subject to many contingencies, as for example, the skill and capital of the tenant, the rate of wages, the state of the market, costs of transit, and many other elements of hazard; such representations therefore are mere matters of opinion, which, even if erroneous, could not form a good ground for reducing the lease" (1). I entirely agree with the observations of the lord ordinary; but I own I am at some loss to understand why they are not quite as applicable to a warranty implied by law as they are to an express warranty averred to

(1) 3d. Ser., vol. ix., p. 487.

have been given by the lessor; and I am at some loss to conceive when the lord ordinary felt that there would be these difficulties in allowing a proof as to express warranty, that it did not occur to his mind, that to a much greater degree they were impediments in the way of allowing proof as to what I have termed an implied warranty of law.

The averments do not even now assert that there are no minerals, or that there is no freestone; but merely that they are not capable of being worked to profit, an averment which implies their existence.

There is a common form of covenant in mining cases, that if the minerals cannot be worked to a profit, there shall be an opportunity to the lessee of giving up the lease upon certain terms stated. That covenant is generally accompanied with a specification of means for ascertaining by the award of arbitrators, or by the opinion of experts, whether it can be predicated of the mine at a particular time, that it cannot be worked to a profit. The word "profit" is there used in a sense altogether different from that in which the appellant would use it here; because where you have an express covenant, "profit" does not mean gain after paying for work and labor, but it means gain after paying for work and labor, and the rent of the mine — a very different position of things from that for which the appellant contends.

There is a well-known principle of the civil law, that where the 283] *subject matter demised turns out to be non-existent, or to be exhausted, or where the working of it turns out to be utterly impracticable, the tenant is relieved from the obligations of the lease. It is attempted to bring up that principle to this case, and to say that it gives to a tenant relief in the same way that the express provision, to which I have referred as being common in mining leases, where minerals cannot be worked at a profit, would give the tenant relief.

I asked the learned counsel for the appellant, in the first place, is there any decided case in support of that proposition? The learned counsel who argued for the pursuer at your lordships' bar were unable to produce any. Undoubtedly, some institutional writers have been referred to, and I take Sir George Mackenzie as an example of them. Sir George Mackenzie (1) speaks of a tenant not being obliged to pay rent where there is sterility; and he says, describing it negatively and there is no sterility where the fruit, the crop, the harvest, exceeds

(1) Inst. 3. 3. 5. Sir George's words are: "If the ground be absolutely barren, the hire will not be due; but if the land yield some profit, though never so little, the hire will be due if the profit exceed the expense of the seed and laboring."

the value of the labor and of the seed. Even with regard to agricultural subjects, I should venture to doubt whether, at the present day, that *dictum* of Sir George Mackenzie is to be taken without very considerable qualification. I took the liberty of putting the case to the appellant's counsel, that there might be a lease of waste or moor land, which a tenant might well be content to take, intending to reclaim it by degrees, and as to which in any one year, or in any small number of years it might be utterly impossible to say that there had been any fruit exceeding the seed, and the labor; and yet it would be a very strong proposition to hold that the tenant could throw up a lease of that kind because the fruit had not exceeded the seed and the labor. Again, there might be land which might be allowed to run into sterility, and become unproductive by the fault of the tenant himself; and there also the *dictum* would not apply.

But without pursuing the question with respect to agricultural leases further, I should doubt extremely whether *dicta* of this kind apply at all to leases of mineral subjects; for although we speak *of a mineral lease, or a lease of mines, the [284 contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things if he can find them, and to take them away, just as if he had bought so much of the soil. It is very difficult to apply to a case of that kind *dicta* which evidently relate to the ordinary process of agriculture.

It is obvious that if these *dicta* were held to apply to mineral leases, the tenant, if he found his lease profitable, would continue to hold it and reap the profit from it; but if he found it unprofitable he would certainly give it up, and the loss would be not his, but the landlord's.

Again, my lords, it would be impossible to apply these *dicta* to mineral leases without some knowledge of the area of time over which to spread the account of profit or of loss. I asked Mr. Pearson, who opened the case with great ability for the appellant, to what time he would refer the question of the profit or loss, and I think he was obliged to admit that he would take the whole period covered by the lease (without counting the breaks) which in the present case would be a period of twenty-one years. Then I asked, how would it be possible at the end

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of the third or the fourth year of the lease, to speculate as to what the profit or loss would be if it were spread over the whole period of the lease. How can you at the end of the third or the fourth year of the lease tell what the price of labor may be in future years; or what machinery may be introduced in future, which may dispense to a certain extent with labor; or what the market value of minerals of the same kind will be at a future period, or what the effect upon the market value of those minerals may be of the discovery of other minerals of the same kind in the same neighborhood. All those things are perfectly uncertain.

Then, my lords, finding that there is no decided case which is an authority for the contention of the appellant, and that 285] there *are no *dicta* of institutional writers which can properly be applied to a case of this kind, I have no hesitation in saying that the appellant has utterly failed to establish that there is in the case of a lease of this kind any implied warranty in law approaching to that express warranty which, in the first instance, he asserted had been given by his landlord. It is upon this ground that I should wish to rest the decision of the case. And I do so the more particularly for this reason, that I observe that some of the learned judges in the court below were rather inclined to rest it upon another ground, namely, to assume that there may be the common law right for which the appellant contends; but that, on the other hand, that common law right is ousted by the express provisions contained in this lease with regard to breaks. If I found that there was a common law right such as has been alleged, I should have great hesitation in saying that anything in this lease did oust that right. If there is such a common law right, I do not see that it is in the least degree impossible that it should co-exist with a lease containing a provision for breaks. I do not, therefore, hold, that the common law right is excluded by the provisions of this lease, but rather that these provisions are to be regarded as a proof that it never was imagined by those who entered into it that there was any such common law right; because if there was such a common law right these provisions, to a great extent at all events, would have been unnecessary.

*Interlocutors appealed from affirmed, and
appeal dismissed with costs.*

Appellant's agent: *James Dodds.*

Respondent's agents: *Grahames & Wardlaw.*

[2 Scotch Appeals, 256.]

March 10, 1878.

**286] *BUCHANAN OF DRUMPELLER and HENDERSON & DIMMACK,
Appellants; ANDREW, Respondent.***Contract—Obligation to submit to Mineral Workings.*

A feu of land was granted reserving the subjacent materials, and stipulating that the feuar should have no claim against the superior or his tenants in respect of any damage that might arise from the working of the minerals. Damage having arisen, the feuar obtained from the Court of Session an interdict prohibiting the mineral workings complained of; but the house of lords revoked the interdict—holding that the feuar had made a contract which bound him to submit to its consequences.

Per THE LORD CHANCELLOR: This interdict imposes on the superior an obligation which it was the express object of the contract to relieve him from. The fact that the contract was improvident cannot alter the construction of a special stipulation.

Per LORD CHELMSFORD: It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning.

In the year 1847, Mr. Buchanan of Drumpeller granted to Mr. Wilson of Dundyvan a lease for nineteen years of certain valuable minerals, chiefly coal, lying mainly, if not wholly, under Coatbridge, a populous village in the Upper Ward of Lanarkshire.

It did not appear that during this lease any damage was done to the surface by the mineral workings of Mr. Wilson, or, after his death, of his testamentary trustees, and it was perhaps from this consideration that in 1859 James Porteous, a draper in Coatbridge, accepted a feu grant of land from Mr. Buchanan, Porteous becoming bound to build a house upon it, and to pay an annual feu duty. The grant reserved to the superior all the minerals underneath, with a remarkable stipulation, assented to by the feuar, that the superior should not be liable for any damage that might arise to the surface land feued or the buildings that might be erected thereon from working and carrying away the minerals underneath. In conformity with this feu contract Porteous built a house and made other erections on the land at an expense of about £900. In 1865 he sold the feu property with all its accompaniments to the above respondent, Mr. Andrew, conveying it to him by *disposition; “but excepting [287 always and reserving to his superior, Mr. Buchanan,” the minerals underneath, with the right of working and carrying away the same in terms of the original feu to Porteous, and under the burdens, conditions, restrictions, limitations, and obligations specified therein.

The lease to Mr. Wilson having expired, a fresh lease of the minerals was granted by Mr. Buchanan to the appellants, Messrs.

Henderson & Dimmack whose operations shortly afterwards gave rise to the present litigation—the respondent, Mr. Andrew (the new feuar) asserting that by reason of the workings of the new mineral lessees, Messrs. Henderson & Dimmack, the walls, ceilings, and partitions of the feuar's house had been rent, and his boundary and parapet walls shaken; but adding that still greater damage would ensue unless the court interposed. He therefore, on the 14th of March, 1867, presented his petition to the sheriff of Lanarkshire praying that Messrs. Henderson & Dimmack might be ordered so to carry on their operations as not to injure or endanger the property of the feuar. Mr. Buchanan, the superior, was called as a party “for any interest he might have in the premises.”

The answer of the superior and his lessees stated that by the feuar contract all the minerals underneath were reserved with an express stipulation against liability for damage. The sheriff ordered a proof; and upon advocacy the lord ordinary ⁽¹⁾ renewed the order for proof, which having been gone into voluminously before his lordship, he, on the 26th of July, 1870, issued an interdict prohibiting the appellants from working their minerals within one hundred yards of the feuar's property. His lordship in a note remarked that

The stipulations of the feu contract must be dealt with in subordination to its main object, viz., the erection and keeping up of a dwelling-house. It would be altogether unreasonable and absurd to suppose that while the feuar was to be bound not only to erect but always to uphold in good repair a dwelling-house, the superior should be at liberty to destroy that house whenever he pleased, and that too without being answerable for the loss or damage thereby occasioned to the feuar.

The appellants reclaimed against this judgment to the Inner House (Second Division), where after much consideration, Lord Cowan, Lord Benholme, and Lord Neaves agreed with the lord [288]*ordinary, but the Lord Justice Clerk Moncreiff dissented. The result was an adherence to the interlocutor complained of. Against this decision the superior, Mr. Buchanan, and his lessees, Messrs. Henderson & Dimmack, appealed to the house, having for their counsel the lord advocate ⁽²⁾, the solicitor-general ⁽³⁾, and Mr. Traiver of the Scotch bar.

Sir *Richard Baggallay*, Q.C., and Mr. *Cotton*, Q.C., were heard for the respondent.

The arguments of counsel are fully adverted to, and the facts of the case, and clauses in the instruments on which the parties rested, are amply set forth in the following opinions:

THE LORD CHANCELLOR ⁽⁴⁾: My lords, generally speaking, when a man grants the surface of land, retaining the minerals, he is

⁽¹⁾ Lord Ormidale.
⁽²⁾ Mr. Young, Q.C.

⁽³⁾ Sir George Jessel, Q.C.
⁽⁴⁾ Lord Selborne.

guilty of a wrongful act if he so uses his own right to obtain the minerals as to injure the surface, or the things upon it; and, as prevention is better than cure, the court would be justified in granting an interdict to prevent him from doing so. But, on the other hand, I apprehend it is the clear law of England and also of Scotland, that when two persons meet and deliberately settle a contract, they are at liberty to enter into such terms (not being contrary to the public law), as they may think fit; and if a feuar of surface lands is willing to take the risk of any injury which may be done by the working of the subjacent minerals, it is perfectly lawful for him to do so; the person who was previously the owner of the entirety being under no antecedent obligation to part with any portion previously his own, except upon such terms as are mutually agreed upon.

In such a case, therefore, the whole matter resolves itself into a mere question of construction. No views of a conjectural kind as to what is, or what is not reasonable, can be admitted if the contract itself is plain and free from ambiguity.

In the neighborhood of the property feued in this case there were several inhabited dwellings; and there were various seams of coal under it, of which the two upper seams had been already *worked out according to the old "stoop and room system," leaving thin and not very permanent walls to support the surface; the entire coal being taken out with the exception only of thin supports liable to decay and still more liable to fall in and break down, should any seams lying either immediately below or near them be, to any material extent, worked. That was the condition of the two upper seams, and there was below them a lower seam, which may or may not have been partially worked before the date of the lease of this particular property, but which appears to have been a seam of considerable value and thickness, and which, if it had been at that time worked at all, had been worked upon what is called the modern, or the improved stoop and room system. By that system more solid pillars are left as the coal is worked out; but when the coal has been taken out from the excavated spaces called "rooms," the mine owner comes back, and by degrees works out the whole of the pillars; so as to remove the entirety of the coal.

I may mention that the same effect would be produced if another known system, called the "long wall system," were adopted, according to which no supports are left at all in the course of the working, except such as may arise from the accidental accumulation of rubbish in the spaces from which coal has been taken out, and which rubbish, at all events under the circumstances of this mine, if left, would not be sufficient to prevent an extensive subsidence of sufficient importance to cause

the injury which the interdict granted in this case was intended to obviate.

I will first consider what is the effect of that portion of the feu contract which expressly refers to the particular subject, and then whether there is any legitimate inference to be drawn from other portions of the contract so as to vary that interpretation.

The feu contract reserves to the superior

The whole coal, fossils, fireclay, ironstone, limestone, freestone, and all other metals and minerals. with full power to work, win, and away carry the same at pleasure, as also to remove as much stone and other matter as may be necessary for the proper working of the said coal, ironstone, and others, and that free of all or any damage which may be thereby occasioned to the feuar.

Now what would have been the effect if the words which I have last read, namely, "free of all or any damage which may [290] be thereby *occasioned to the feuar," had not been contained in the instrument? Without those words it would have been a mere reservation of the minerals, with full power to work, win, and away carry the same at pleasure, and also to remove as much stone and other matter as might be necessary for the proper working of the minerals. The effect of such a reservation, standing alone, according to the law of both countries, would have been that the whole property in the mineral strata would have been reserved to, and would have remained in, the previous owner, and he would have had an unlimited power of dealing with that as his own, but he would have been subject to the general restriction which every owner of property is under, expressed by the maxim, *sic utere tuo ut alienum non lædas*. Consequently, the interdict which has been granted by the court below would have been right and proper had the matter rested there.

But then come in the words, "free of all or any damage which may be thereby occasioned to the feuar." It is very difficult to understand what these words can mean, except this, that to the full extent of that which is reserved, the working may take place, even though it occasions damage—for which the superior is not to be responsible. The parties, appearing to have been anxious to make their meaning clear, go on to state that

It is expressly agreed that the superior shall not be liable for any damage that may happen to the said piece of ground, buildings thereon, or existing hereafter thereon, by or through the working of the coal, fireclay, ironstone, freestone, or other metals or minerals in or under the same, or in the neighborhood thereof, by long-wall workings or otherwise, or which may arise from or through the setting and crushing of any coal-waste, or other excavation presently existing, or which may exist hereafter within or in the neighborhood of the ground hereby disposed, through the the said superior working or draining the said metals or minerals, or others as aforesaid.

Your lordships will see that this express agreement to exclude

claims for damage is not confined to some particular description of damage, but it extends to any damage, the words being "and shall not be liable for any damage."

Secondly, the feu contract particularly takes notice of the buildings, and of the liability of those buildings to damage through the workings; and it says that the superior shall not be liable for any damage which may happen to any buildings then upon the *property, or afterwards to be there. The [29] importance of that reference to buildings will be seen presently, when we come to the latter part of the deed which relates to that particular subject. Thirdly, the feu contract takes notice of the modes of working by which such damage may happen, and puts foremost "long wall workings,"—a remarkable thing; because that was not the mode of working actually in use, or which ever had been in use there; and it was a mode of working which would completely extract, if it were followed, the whole of the coal without leaving any supports whatever, except such limited supports as might arise by rubbish left in the mine, and which, according to the evidence relating to this mine, would have been clearly insufficient to prevent damage by subsidence. I ought further to remark that the feu contract notices two kinds of damage: the one direct damage by the working of the seams remaining to be worked; and the other what I may describe as indirect damage by the subsiding of the wastes in the two seams already worked, in consequence of those excavations. The feu contract deals with the damage arising from the loss of lateral support occasioned by working in the neighborhood, as well as with the damage arising from the loss of support occasioned by workings immediately under the surface in question. Can anything possibly be more clear, than that the intention of the parties on both sides was that the superior was to have the unrestrained right of taking out the whole and every part of the reserved minerals, the whole risk of any consequent damage being undertaken and to be sustained by the feuar?

It has been suggested that the exclusion of damage may not exclude the right to an interdict. But, my lords, I apprehend that a right to an interdict is founded only upon proof that the act is injurious and wrongful. Every act which is injurious and wrongful is an act for which there must be a liability to damages; and it is only, therefore, because it is such an act as would carry with it a liability to damage that the better remedy of interdict can be applied. The moment the damage is renounced it becomes a *damnum sine injuriâ*, and to a *damnum sine injuriâ* neither interdict nor action for damages applies. Therefore it appears to me to be as clear as possible, that the intention of the

292] *parties was upon the one side to renounce all claim to compensation, and on the other to escape from any liability whatever for damage that might occur from excavating the entirety of the minerals.

But it is said that this construction may be limited by assuming a proper mode of working, and to that, if the word "proper" is rightly understood, I entirely agree. The superior, in entering into this contract, only contracts for power to work and get the coal, and to be exonerated from any damage which may arise through the working of the coal. The very words "proper working" occur incidentally in one place, although not in the principal clauses in this part of the contract; but that only means that, if the superior does that which is not needful or proper to the getting of the coal, and if the act so done leads to the subsidence of the surface, it is an act not within the scope or intention of this contract, and therefore the superior is not protected by this clause in such a case. To let down the surface is not the thing which he contracts for; he contracts for power to work his reserved coal, and he is not to be answerable for damage by subsidence arising in that way. Wanton, reckless, or improper working, therefore, is a thing which is not in the view of either of the parties. If this working, which is prohibited by the interlocutor, were wanton, reckless, or improper, doubtless there is nothing here which would prevent it being interdicted. But is it so?

The question is, what is the meaning of "proper working?" I apprehend that the word "proper," has reference only to the subterraneous mineral working—it has nothing whatever to do with the surface. The obligation to maintain the surface is independent of the right of working where it exists; and however proper the mode of working might be, if it let the surface down, and that was a thing which the mineral owner was not at liberty to do, the mineral owner would be answerable in damages for so doing. Of course there is a very intelligible sense of the phrase "proper working," which might refer to the upholding of the surface; but that, I apprehend, is not the sense in which it could be introduced into a contract which expressly stipulates that the mineral owner shall be exonerated from damage arising either to the surface or to the buildings upon it.

293] *The construction which I am advising your lordships to place upon this contract is exactly the same as that which Lord Hatherley, when vice chancellor, placed upon a contract in this respect precisely similar. In *Williams v. Bagnall* (1) it was said, that you could possibly suggest some description of damage which might be provided against short of subsidence

(1) Weekly Notes, 15th December, 1866, p. 392.

by ordinary workings. Lord Hatherley held that that was not consistent with the language of the contract, which expressly provided that the party was not to be liable for any damage. He said also, with regard to the suggestion of working so as to uphold the surface, that to introduce such a limitation would simply be to defeat the whole object of those stipulations.

Then, I say, if we rest on this portion of the contract, there really is no ambiguity and no uncertainty. The feuar has deliberately taken upon himself this risk, and this interdict imposes upon the superior an obligation which it was the express object of the contract to relieve him from.

But then it is said that we find here what did not occur in the case of *Williams v. Bagnal*, or in any other case cited — namely, an express stipulation to build a dwelling house of a certain description and value on the premises, and to maintain that house in repair, the building being erected according to a plan rather elaborately defined, the whole being an onerous obligation cast upon the feuar. It may seem that this was perhaps an improvident contract. But how can that fact alter the construction of an express stipulation, that the superior shall be exonerated from all liability for damage arising from subsidence to any buildings that may thereafter be erected upon the property? One thing is quite plain, that although the feuar agreed with the superior to erect buildings, both parties did contemplate that the buildings so erected might be damaged or destroyed by the mining operations of the superior, in respect of which he was not to be responsible, and for which he was not to make compensation. Buildings being expressly in contemplation, it seems to me that that is quite enough, whether he contracts to build them himself, or is left at liberty to do it by contracting with another party. In *Williams v. Bagnal* it is clear that the land was sold as building land, and that buildings *were in contempla- [294] tion. They were buildings, I think, of rather a more valuable kind than those which are in view here — namely, ironworks and machinery. But the vice chancellor did not think that that circumstance prevented the parties from being capable of contracting that the whole risk of any damage by subsidence should be with the owner of the buildings, whatever were his obligations in respect of them, and that the mineral owner should have as free and unfettered a right to work out the whole of his minerals without being liable for any damage whatever, as he would have had if he had not granted the surface to any other person.

This, then, is the agreement which the parties have made, and in the latter portion of it there is not a single word which has a legitimate bearing upon the construction of the words which are to be found in the earlier clause which I have referred to;

and, therefore, the interdict which has been granted is in truth an interdict relieving the feuar from his contract, without any action of reduction, or any cause that I can perceive, why he should be so relieved. Therefore, my lords, the motion that I shall make to the house is, that these interlocutors be reversed, and the appellant assoilzied from the conclusions of the action.

LORD CHELMSFORD : It is admitted that if the reservation is to be construed according to the ordinary meaning of language, there can be no restraint upon the right of the mineral proprietor to remove every particle of the coal under the piece of ground feued, though the inevitable consequence must be the total destruction of the feuar's dwelling-house. But it is contended by the feuar that, the object of the feu contract being to have a dwelling house of a particular description built and maintained, the generality of the words of the reservation is to be restrained by reference to this object, and that the only proper working of the coal must be intended to be such as shall consist with an upholding of the surface and buildings.

This construction is maintained by the judges who decided the case in the feuar's favor, on the assumption that the feuar would never have entered into a contract obliging him to build and 295] *maintain a house which at any time might be destroyed by the exercise of rights belonging to the person who imposed the obligation upon him. Lord Cowan puts this very strongly. He says :

Suppose it had been in express words stated that the superior and his mineral tenants were to have full power at their pleasure to put the feuar's property into this certain peril, and it were asked whether the feuar would have entertained such an unreasonable and disastrous proposal, he certainly never would.

But, with great submission, this appears to me to be determining what has been done by a conjecture of what was likely to have been done. And then, in even stronger language, Lord Cowan says :

It appears to me, that the clause behoved to have in express terms provided that the feuar was to submit to have his property destroyed without redress should the superior or his mineral tenants resort to the modern system of stoop and room working.

It is difficult to see in what more precise language the feuar could have submitted to this contingency than by agreeing to a reservation by which the whole of the coal is reserved to the proprietor, with full power to work, win, and away carry the same (i.e. the whole of the coal) at pleasure ; it being expressly agreed that he shall not be liable for any damage that may happen to the piece of ground and buildings thereon by or through such working. Lord Cowan, in the passage which I have read, seems to consider that the destruction of the property will be the necessary consequence of resorting (as he calls it) to

the modern system of stoop and room working. But this system seems to have superseded the former one (of course in cases only where there was no obligation to uphold the surface) at the time of the feu contract. Porteous, when he became the owner of the piece of ground, and Mr. Andrew at the date of the disposition from him, must be taken to have made themselves acquainted with the nature of the underground operations, and to have entered into their contracts with reference to them; and the modern system of stoop and room working was not resorted to after the feu contract, but was the mode of working in use at the time by Wilson and Wilson's trustees, and was continued by Henderson and Dimmack when they succeeded as the mineral tenants.

It cannot then be said that this, which was the ordinary mode *was not a proper mode of working, supposing the [296] proprietor of the minerals had a right to get the whole of the coal, and was not bound to leave a support for the surface. Of course he must be liable for any damage which may happen to the surface from unskillful or negligent working; but I am at a loss to understand how working in the ordinary way upon an established system can be properly characterized (as it is by Lord Benholme (*) as "a reckless mode of working."

Lord Benholme puts the propriety of the interdict upon a ground which it appears to me, with great respect, cannot be supported. He supposes the mineral proprietor to say:

You must not look for any reparation in the shape of damages. If you were to attempt any such thing, the absolute clause in your feu contract would put you out of court, and that is the reason why you shall not be allowed to protect yourself by interdict from the doing of the deed against the consequences of which you have no redress against me. Prevention is ever preferable to cure. But prevention becomes absolutely indispensable when the threatened injury admits of no redress.

What is this but to say to the person asking for the interdict: You have weakly and foolishly entered into an agreement whereby you have given to another person the liberty to do you damage without being answerable for it. We will interpose to protect you from the consequences of your folly by preventing that being done which you have agreed that the other party to the agreement shall have the right to do. This would be, if not to make a new contract, at least to annul the provisions of the existing one.

Lord Neaves (*), following Lord Benholme's view, holds that if it is demonstrable that the consequence of the mode of working would be a destruction of the surface, that would not be a proper working. And he adds that he cannot presume such to have been intended without words far more explicit than are

(*) 8d Series, vol. ix, p. 568.

(*) 8d Series, vol. ix, p. 569.

contained in the clause of reservation. He even doubts whether a clause of this kind explicitly made could be enforced. No doubt of this nature, however, was expressed in the course of the argument. On the contrary, I put the case to the learned counsel for the respondent of land, feued with an obligation to build a house and keep it in repair, with a reservation to the 297] superior of the power to remove *the house at any time if it interfered with the exercise of rights which he possessed. And he admitted that such an agreement would be perfectly valid. Indeed, to deny this would be to adopt the *dictum* of Lord Denman in *Hilton v. Lord Granville* ⁽¹⁾, which was frequently doubted, and at last has been distinctly overruled.

Sir *Richard Baggallay*, in his clear and able argument, did not rely upon the improbability of the respondent having entered into a contract which left him at the mercy of the mineral proprietor, nor deny that the words of the reservation, taken by themselves, would be sufficient to give the mineral proprietor the right to remove the whole of the coal from under the piece of ground in question; but he contended that the clause must be read in connection with, if not in subordination to, the object of the feu contract, which was to provide for the building and keeping up a house on the ground feued. And therefore he insisted that the words "the proper working of the coal" contained in the reservation must be construed with reference to this primary object of the contract. He endeavored to show that Wilson's trustees had worked so as to leave pillars as a support to the surface; and he therefore contended that if Henderson and Dimmack were removing these pillars they were not pursuing a proper mode of working.

But the operations of Wilson's trustees were not such as that described. On the contrary, it is proved that they were getting the coal on the modern stoop and room system, and accordingly in their forward working they had left large pillars; but they had commenced in working back to remove some of these pillars when their lease came to an end, and Henderson and Dimmack succeeded them.

If the respondent is right in saying that under the reservation the working of the coal must be carried on with reference to the security of the building, then the mineral tenants must not come within one hundred yards of the dwelling-house, which the witnesses say would be a reasonable distance to ensure absolute safety, so that the mineral tenants would be deprived of a quantity of coal beyond the limits of the rood of ground feued to the respondent.

The whole argument of the respondent is involved in the

(1) 5 Ad. & E. (Q. B.), 701, Feb. 10, 1845.

*asserted restriction of the generality of the words of the [298 reservation in order to render it subservient to the obligation to the feuar to build and maintain the dwelling-house. But this mode of dealing with the reservation seems to be adopted, although not avowedly, on account of the assumed impossibility of any person entering into a contract which it is taken for granted is a highly imprudent one, thereby resorting to conjecture instead of resting upon construction. For how can it properly be assumed that there is imprudence in the contract? It may have suited Porteous's purpose to become the owner of the piece of ground upon the agreed terms; or, assuming that his entering into such a contract was an act of imprudence, is that any reason why full effect should not be given to it?

It is the safest and best mode of construction upon all occasions to give to words free from ambiguity their plain and ordinary meaning. The case of *Williams v. Bagnal*, cited from the *Weekly Reporter* (*) and the *Weekly Notes* (*), approaches very nearly to this, because, although there was in that case no obligation on the plaintiff, the purchaser, to build, yet it appears from the statement in the *Weekly Notes* that the grant was made to him for building purposes. The reservation of the minerals, with the power of working them without being answerable for any damage, was as large as in the present case. And the lessee of the minerals, having by his workings caused a subsidence of the land, the purchaser sought to restrain his further working on the ground that a grant of the surface included by implication of law everything necessary for its support, and that a man could not derogate from his own grant. But the vice-chancellor held that the implication of law was swept away by the express terms of the contract, which were plain, clear, and ample, and dismissed the bill with costs.

I cannot better conclude my view of the case than in the words of the Lord Justice Clerk: "I look on these obligations to the mineral owner as part of the consideration for the feu: and I can see no reason for permitting the feuar, while he retains the benefit, to repudiate the conditions of his right."

My lords, I think the interlocutors appealed from ought to be reversed.

*LORD COLONSAY: Where there is a stipulation such as [299 we have here, I think it is impossible to deny effect to it; and I cannot see how this effect can be given without rejecting the pleas of the respondent.

The ground upon which the majority of the court below proceeded was that the workings were not proper workings, because they produced the result that is complained of. I venture to

(*) Vol. xv. p. 272.

(*) 1866, Dec., 10, p. 392.

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think that that was a mode of reasoning in a circle. If the fact that they produced the injury is enough to determine the character of the workings as to whether they are proper workings or not, there is no effect given to the special stipulation, and there is no occasion for going further into any examination of the contract. I do not see in a case like this where the stipulation is express that it is possible to get over it.

I therefore concur in the judgment proposed by my noble and learned friend.

Interlocutors reversed with costs, and a direction to pay back expenses awarded by the court below (').

Appellants' agent: *William Robertson*.

Respondent's agents: *Grahames & Wardlaw*.

(') The case as decided below is fully reported in the 3d Series, vol. ix. p. 554.

CASES IN THE PRIVY COUNCIL.

[Law Reports, 4 Privy Council, 572.]

J.C.* Feb. 4, 5, 6, 1873.

*THE LONDON CHARTERED BANK OF AUSTRALIA, Appellant; [572
and WILLIAM GEORGE LAMPRIERE and OTHERS, Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF
VICTORIA.

*Separate estate of a Married Woman with power of appointment by Deed or Will—
Debts of Married Woman—Banker's lien—Pleading—Fraud charged and not
proved—Costs.*

The property of a married woman, settled by an ante-nuptial settlement for her separate use for life, with remainder as she should by deed or will appoint, with remainder in failure of appointment to her executors or administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire *corpus* in her for all purposes.

A., a widow and the administratrix of her deceased husband (who had died intestate), and entitled to dower as to his real estate, and to a third of his personal estate, being about to contract a second marriage, executed with her intended husband a settlement, whereby she settled the estate she was so possessed of and entitled to, to her sole and separate use, with power of appointment by deed or will, and with his consent gave a letter instructing her bankers to keep separate accounts, and to consider any private overdraft by her on her own account secured by the administrative deposits in their hands. At this time two sums of £6,000 and £8,000 were in deposit on such account, and subsequently various other sums were, from time to time, paid in by her to the same account, and placed at interest with the bank, who * allowed her to overdraw her private account [573 on the strength of the arrangement so made.

By her will she executed the power of appointment reserved to her by the settlement, and having at the time of her death overdrawn her private account to a considerable amount, the bankers claimed, as against the parties interested under the will, to retain the sums so paid into their hands, on account of the administrative account, and especially the sums of £6,000 and £8,000, so deposited with them, in payment of the sums due to them on account of the overdrafts made by her on her private account, and brought a suit in the Supreme Court of the Colony of Victoria to enforce such lien. The Supreme Court dismissed the suit:

Held by the judicial committee, reversing such decision, that, whether or not the bankers had notice of the settlement (which fact was uncertain) the letter of instruction to them by A. was a valid execution of the right reserved by her, as regarded the two sums of £6,000 and £8,000 then in their hands, and in the absence of fraud gave the bankers a lien on those sums for any future overdraft that might be made in accordance with the terms of such letter.

The *dictum* of Lord Justice Turner in the case of *Johnson v. Gallagher*,⁽¹⁾ as to the liability of the separate estate of a married woman for debts contracted with reference to such estate, approved and adopted. The case of *Shattock v. Shattock* ⁽²⁾ dissented from.

If the relief sought by the bill is based on fraud, the failure to prove it is fatal;

*Present:—THE LORD JUSTICE JAMES, SIR BARNES PEACOCK, THE LORD JUSTICE MELLISH AND SIR MONTAGUE EDWARD SMITH.

⁽¹⁾ 8 D. F. & J., 494.

⁽²⁾ Law Rep., 2 Eq., 182.

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but if by striking out of the bill the charge of fraud there is sufficient equity stated and proved, and the charge of fraud is only subsidiary, it is a matter only affecting costs.

THIS appeal was brought from a decree of the primary judge in equity of the Supreme Court of the Colony of Victoria, dismissing the appellant's bill, and also from a decree of the full court on appeal dismissing an appeal from that decree with costs.

The question arising on the appeal was, whether the appellant, by virtue of a letter, dated the 4th of April, 1862, was entitled to a lien on the share of Mrs. Aitkin, deceased, in the estate of her first husband, Jeremiah George Ware, late of Koort Koort Nong station, in the Colony of Victoria, and in particular on two sums of £8,000 and £6,000, deposited by her with the appellant's bank, notwithstanding a settlement made on her second marriage, and her appointment by will in exercise of a power in such settlement contained.

The appellant's bank was incorporated by royal charter, and carried on the business of banking in the Colony of Victoria.

The several respondents were the trustees of the settlement made on Mrs. Aitkin's second marriage; James William Manifold [574] fold * Aitkin, her second husband, and William George Lemprière, the executors and trustees of her will; the children of Mrs. Aitkin by her second husband; the legal personal representative of Jeremiah George Ware of the estate not administered by Mrs. Aitkin, the original administratrix; the receiver appointed in a suit of "*Ware v. Ware*" for the administration of Jeremiah George Ware's estate, instituted in the Supreme Court of the Colony of Victoria; the six children of Mrs. Aitkin by her first husband; and the trustees of the settlement executed on the marriage of Mary Hickling, one of such children, with Frederick James Hickling, and which comprised her interest under her mother's second marriage settlement and will. The respondent, the National Bank of Australasia, was the assignee of a legacy of £5,000 given to James William Manifold Aitkin by Mrs. Aitkin's will, and the official assignee of James William Manifold Aitkin, whose estate was, on the 16th of May, 1870, placed under sequestration for the benefit of his creditors, was also a respondent.

The material facts of the case were these: J. G. Ware died intestate on the 22d of October, 1859. His personal estate was of great value, and consisted chiefly of stations or runs, and stock and other chattels thereon, to one-third share of which Anne Young Aitkin was entitled as his widow. He also owned other real estate, in which Anne Young Aitkin was entitled to dower.

On the 16th of November, 1859, letters of administration of the personal estate of the intestate were granted by the Supreme Court of the Colony of Victoria to his widow, afterwards Mrs. Aitkin. In the month of March following a suit was instituted in that court in its equitable jurisdiction by the respondent, J. G. Ware, one of the children of Mrs. Aitkin by her first husband, for the administration of the estate of the intestate, which is still pending. By an order made therein on the 14th of March, 1865, the respondent, Joseph Ware, was appointed receiver and manager of the rents and profits of the real estate and stations of the intestate.

During her widowhood, Anne Young Ware kept two accounts with the appellant's bank at the Geelong branch. One was a *private account, and was opened and kept simply in the [575 name of Anne Young Ware, and the other was an administration account, and was opened and kept by her as administratrix of the estate of the intestate in the name of "Anne Young Ware, administratrix."

On the 9th of March, 1860, Anne Young Ware authorized the bank to honor checks of her son, the respondent, John Ware, who was her agent in the management of the intestate's estate, drawn on her administration account.

On the 20th of March, 1862, Anne Young Aitkin, then Anne Young Ware, widow, intermarried with the respondent, James William Manifold Aitkin.

The share of Anne Young Aitkin in the personal estate of the intestate had not been ascertained at the time of her second marriage, and it was not, in fact, ascertained until the master in equity made his general report in the suit of "*Ware v. Ware*," on the 20th of December, 1865, but all the debts of the intestate had then been paid, and she was then to the knowledge of the bank entitled to a large sum in respect of such share, and was also then entitled to a further sum for arrears of rent or income, in respect of her dower in the real estate, of which there had been no assignment.

In contemplation of such marriage there was executed a settlement, dated the 19th of March, 1862. By this settlement Anne Young Aitkin, with the privity and consent of James William Manifold Aitkin, assigned unto William George Lemprière and William MacRobie all her right and title to dower in the real estate of the intestate, and all income then or thereafter to become due to her in respect thereof, upon trust that W. G. Lemprière and W. MacRobie, or other the trustees or trustee for the time being of the settlement, should during the life of Anne Young Aitkin pay to her, for her sole and separate use, but without power of anticipation, all moneys which might

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come to their hands under the assignment; and after the death of Anne Young Aitkin, as to all moneys which might have accrued or become due in respect of such dower, and which might not have been received by the trustees for the time being, upon trust for such persons and purposes as Anne Young Aitkin 576] should, notwithstanding coverture, *by deed or will appoint, and in default of appointment to her executors or administrators. And by the same indenture Anne Young Aitkin assigned unto W. G. Lemprière and W. MacRobie all her share of the personal estate of the intestate, and of the income and profits thereof, upon trust that W. G. Lemprière and W. MacRobie, or other the trustees for the time being, should out of any principal moneys which might come to their hands by virtue of the assignment last aforesaid, in the first place set apart the sum of £15,000, and invest the same as in the indenture mentioned, and should pay, assign, and dispose of that sum, and the securities upon which the same might be invested, and the interest thereof, to such person or persons, upon such trusts, and for such purposes as Anne Young Aitkin should, notwithstanding coverture, by deed or will appoint. And in default of and until appointment, should during the joint lives of Anne Young Aitkin and James William Manifold Aitkin pay the interest to Anne Young Aitkin for her sole and separate use. And after the death of Anne Young Aitkin so much of the sum of £15,000, and securities, and the interest thereof, as should have been unappointed and undisposed of by her, were to remain, in case James William Manifold Aitkin were to survive her, in trust for her executors and administrators. And it was by the same indenture declared, that the trustees for the time being should stand possessed of the residue of the principal moneys which should come to their hands by virtue of the assignment, after setting apart the sum of £15,000, upon trust that they should invest such residue as thereby provided, and should during the joint lives of Anne Young Aitkin and James William Manifold Aitkin pay the income thereof, and of the securities upon which the same might be invested, unto Anne Young Aitkin for her sole and separate use, but without power of anticipation; and after the death of Anne Young Aitkin should stand possessed of the residue and securities, and the income thereof, in trust for the children of Anne Young Aitkin, then existing or to be born thereafter, as she should by deed or will appoint, and in default of children, for such persons as she should in like manner appoint.

Shortly after the marriage, viz., on the 4th of April, 1862, Mr. and Mrs. Aitkin called at the Geelong branch of the appellant's 577] *bank, and had an interview with John Galletly, the ma-

nager there. There was conflicting evidence as to what took place at this interview, and especially on the question, whether any allusion was made to the marriage settlement. It was admitted, on the one hand, that Galletly did not inquire, whether there was any settlement; and on the other hand, that Mrs. Aitkin never mentioned that there was one; and the appellant's case was, that it must be concluded from the evidence that no allusion thereto was in fact made by Mrs. Aitkin, by whom alone it was alleged by the respondents to have been made. It was in evidence, that at this interview Mrs. Aitkin stated, that she had called with reference to her accounts, and in answer to an inquiry made by Galletly, said that she did not intend making any change. She added, that she would require the same facilities for getting money from the administration account as she had previously had, and might require to overdraw her private account on the security of the administration account, and that she wished John Ware to have the same authority as to drawing checks as before. Galletly said, that it was only necessary to change the title of the accounts from Ware to Aitkin, and he drew up the following letter, which he stated was intended to express her wishes. She signed the letter, and on Galletly mentioning that Mr. Aitkin's consent was required, he also signed it.

Geelong, 4th April, 1862.

"The manager, London Chartered Bank, Geelong.

"Dear Sir,—Herewith I send you two checks amounting to £1,363 3s. 7d. and £4,484 18s. 7d., drawn by me on my private account and administration account, and hereby request you to transfer the amount to accounts respectively to be opened in your bank in the name of 'A. Y. Aitkin,' and 'A. Y. Aitkin, administratrix.' Any checks outstanding, or any bills drawn, accepted, or indorsed 'A. Y. Ware,' or 'A. Y. Ware, administratrix,' to be placed to the new accounts respectively. And you will consider any private overdraft of mine secured by my administration deposits in your hands, and please to recognize Mr. John Ware's signature as formerly on the administration account.

"I am, yours truly,

"I consent. James M. Aitkin.

"A. Y. Aitkin.

"John Galletly, Witness."

*The sums of £1,363 3s. 7d. and £4,484 18s. 7d. mentioned in this letter were at the date thereof standing to the credit of the private and administration accounts respectively, and were thereupon transferred to new accounts opened in ac-

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cordance with the request contained in the above letter. Anne Young Aitkin continued, with her husband's consent, to act on the new accounts thus opened with the bank. On the 20th of October, 1863, she transferred £8,000, and on the 3d of March, 1864, she transferred £6,000 from the administration account to a deposit account at interest, and these sums remained so deposited until her death.

Acting on the arrangement embodied in the letter of the 4th of April, 1860, Mrs. Aitkin was permitted to overdraw her private account to a large amount. At the time of her death there was due in respect of such overdraft, including interest at the current rate charged by the bank, according to the usual course of dealing, the sum of £13,438 2s. 8d. It was to this sum and subsequent interest that the appellant's claim referred.

Mrs. Aitkin died on the 19th of June, 1867, having by her will, dated the 3d of October, 1864, appointed the respondents J. W. Manifold Aitkin, W. G. Lemprière, and W. MacRobie, trustees and executors thereof, and she further appointed that all moneys which might have accrued in respect of her dower in the real estate of the aforesaid intestate, and might not have been received in her lifetime, should upon her death be paid to and held by the trustees of her will upon the same trusts as were thereafter declared concerning the sum of £15,000; and as to this sum she gave £5,000, part thereof, to her husband, the respondent Aitkin, and gave the rest upon trusts for her second son, John Ware the younger, and in certain events for her other children, and by the will Mrs. Aitkin exercised the appointment reserved to her by the settlement over the residue of the moneys comprised therein, and appointed the same upon certain trusts for her children.

By a deed, dated the 20th of March, 1868, the respondent, Aitkin, assigned his legacy of £5,000 to the respondent, the National Bank of Australasia, by way of security for a debt due from him to that bank, and interest.

On the death of Anne Young Aitkin the appellant claimed to be entitled to be paid the principal moneys and interests due on [579] *the overdraft of her private account, out of her share in the personal estate and her dower in the real estate of her first husband, and out of the sums of £8,000 and £6,000 so deposited as aforesaid, and the interest thereon. This claim was disputed by the persons interested under the settlement made on Mrs. Aitkin's second marriage, and also by Joseph Ware, as the receiver and manager in the suit of "*Ware v. Ware*," and by John Ware, as the legal personal representative of Jeremiah George Ware.

The appellant thereupon filed a bill in equity for the purpose of enforcing the claim. To this bill, which was amended, all the respondents were made defendants.

The bill set forth the facts before stated, and, regarding the interview at the bank with Mr. and Mrs. Aitkin on the 4th of April, 1862, already stated, alleged that Anne Young Aitkin and the defendant Aitkin, her husband, did not, either of them, on the 4th day of April, 1862, or at any time, disclose to the manager the existence of the indenture of settlement on the 19th of March, 1862, but, for the purpose of obtaining such overdraft as aforesaid, concealed from him the fact of such settlement having been made; and the manager was not, nor was the plaintiff, aware during the lifetime of Anne Young Aitkin that any settlement had been made on her marriage with the defendant, James William Manifold Aitkin, but believed that the whole of her distributive share in the personal estate of the intestate and her dower was at the absolute disposal of herself and her husband, and that if the existence of the settlement had been known to the manager or to the plaintiff, the arrangement made on the 4th day of April, 1862, would not have been entered into, and Anne Young Aitkin would not have been permitted to overdraw her private account; and the plaintiff submitted that, under the circumstances, the concealment of the settlement was a fraud upon the plaintiff, and that the distributive share of Anne Young Aitkin (formerly Ware) in the personal estate of the intestate, and all moneys which might be payable in respect of her dower in his real estate, or any part thereof, were liable to make good to the plaintiff, in priority to any claim of the parties interested under the settlement or will, the sum so due to the plaintiff, with interest as aforesaid in respect of the overdraft; and that until such sum and in- [580] terest was fully paid the plaintiff had a lien upon, and was entitled to retain, the deposits of £8,000 and £6,000 as security for the same; and further alleged that the defendants insisted, that the defendant, John Ware, as such administrator, or the defendant, Joseph Ware, as the receiver appointed in the suit, was entitled to the deposits of £8,000 and £6,000, and accruing interest thereon, and the defendants, John Ware and Joseph Ware had demanded the same from the plaintiff, and threatened and intended to bring an action at law against the plaintiff therein for the recovery thereof, although the defendants were well aware of the arrangement made between the plaintiff by its manager and Anne Young Aitkin and her husband for the overdraft, and never disclosed the existence of the settlement to the plaintiff; and the bill prayed, that it might be declared, that the share to which Anne Young Aitkin (formerly Ware)

was entitled as widow of the intestate in his personal estate, and the moneys payable in respect of her dower in his real estate, were liable to make good the sum due to the plaintiff, with interest, in respect of the overdraft, and that until such overdraft was fully paid that the plaintiff had a lien upon, and was entitled to retain, the deposits of £8,000 and £6,000 as security for the same; and for an account of what was due to the plaintiff in respect of the overdraft. That the defendant, John Ware, in case he should admit assets for that purpose, might be decreed to pay to the plaintiff what should be found due on taking such account; and that in case he should not admit assets, then that the share of Anne Young Aitkin in the estate of the intestate might be ascertained, and the personal estate of the intestate, so far as might be necessary for that purpose, administered under the direction of the court; and for an account of the moneys payable in respect of the dower of Anne Young Aitkin in the real estate of the intestate, or any part thereof, and that the share and moneys might be applied in payment of what should be so found due to the plaintiff; and that the defendants, Lemprière, Murray, and Aitkin might be severally restrained by injunction from receiving or applying upon the trusts of the settlement or will any of the moneys or 581] property *assigned by the indenture of settlement; and that they might be directed to apply the same in or towards payment of the plaintiff's claim; and that the defendants, John Ware and Joseph Ware, might be restrained from bringing any action at law for recovery of such deposits.

By the answer the main defense raised by the defendants was, that the settlement made on Mr. Aitkin's second marriage was disclosed to Galletly in the course of conversation at the interview of the 4th of April, 1862, and it was in effect insisted by the defendants, that the appellant's claim was defeated by the settlement, and that the persons interested thereunder and under Mrs. Aitkin's will took her share in her first husband's estate, discharged from all lien claimed on behalf of the appellant.

The suit was heard before Mr. Justice Molesworth, one of the primary judges in equity of the Supreme Court of the Colony of Victoria, on the 14th, 22d, and 25th of November, 1870. Galletly and Nicol were examined *vis à voce* on behalf of the appellant and cross examined on behalf of the respondents. James William Manifold Aitkin and John Ware were also examined *vis à voce* on behalf of the respondents and cross examined on behalf of the appellant.

Mr. Justice Molesworth, on the 12th of December, 1870, gave judgment dismissing the appellants' bill with costs.

The case was then taken on appeal to the Supreme Court of the Colony of Victoria, sitting in Banco, on the 23d of December, 1870. The appeal was dismissed with costs. The reasons of the chief justice, Sir William F. Stawell, and the other judges, for the judgment of the Court of Appeal were, first, that there was no evidence of concealment, or intention to conceal, the settlement on the part of Anne Young Aitkin or her husband; secondly, that it was the duty of the manager to have made inquiries as to the existence of any such settlement.

From this judgment the present appeal was brought.

The *Solicitor-General* (Sir G. Jessel), Mr. Dickinson, Q.C., and Mr. Kekewich, for the appellant: The question to be decided in this appeal is, whether the appellant *is not, under the [582] circumstances, and by virtue of the letter of the 4th of April, 1862, entitled to a lien on the share of the late Mrs. Aitkin in the estate of her first husband, Ware; more especially in the two sums of £8,000 and £6,000, deposited by her with the bank, notwithstanding the settlement executed on her second marriage with Aitkin, and the appointment by her by will, in the exercise of the power contained in such deed of settlement. We maintain, that the bank had no notice of the settlement, and the exercise of the power by Mrs. Aitkin reserved to her in it was a fraud on the appellant, and could not affect his lien on the funds deposited with him. The true conclusion, from the evidence, is, that the existence of the settlement, if not intentionally concealed from the appellant, was at least not disclosed to him, as it ought to have been, on the 4th of April, 1862. It was no part of the duty of the appellant to make inquiries regarding the execution of a settlement; and it appears that during Mr. Aitkin's life he had no knowledge of the existence of such. The exercise of a power, therefore, under it, over funds on which the appellant had a clear lien for his customer's overdrafts, was a fraud on him and cannot be supported: Sugden on Powers, pp. 331 n. (l), 474, 476 [8th ed.]. The power given was to be executed by deed or will; if executed by deed, notice must be given to the bank; the concealment, therefore, of the settlement from them was a fraud, and the information of that fact improperly withheld: *Archbold v. The Commissioners of Charitable Bequests for Ireland* (1) *Bromley v. Smith* (2); *Vaughan v. Vanderstegen* (3). All the cases on this point illustrate the same hypothesis of fraud to be imputed from concealment. In *Johnson v. Gallagher* (4) the liability of the separate estate of a married woman for her individual debts was much discussed, and though the Lord Justices Knight

(1) 2 H. L. C., 440-459.

(2) 26 Beav., 644.

(3) 2 Drew., 165, 363.

(4) 3 D. F. & J., 494.

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Bruce and Turner differed in the reasons which led them to the same conclusion, yet the decision in that case is strongly in our favor.

But should the settlement be held good against the appellant's lien, yet Mrs. Aitkin having exercised the power of appointment by will, as reserved to her, so much of the several sums of 583] £8,000, *and £6,000, as formed any part of her share of her late husband's estate, or was appointed in favor of her second husband, was liable, and ought to have been applied towards the satisfaction of the debt due to the bank, on the security of the letter of the 4th of April, 1862.

Even if fraud was not proved, the other allegations being proved are grounds for a decree: *Archbold v. The Commissioners of Charitable Bequests for Ireland* ⁽¹⁾; *Hickson v. Lombard* ⁽²⁾; *Espey v. Lake* ⁽³⁾; *Parr v. Jewell* ⁽⁴⁾.

Sir R. Baggalay, Q.C., and Mr. C. Hall, for the respondents, John Ware, and others.

Mr. Cotton, Q.C., and Mr. Lindley, Q.C., for the respondents, Lemprière and others; and

Mr. Fry, Q.C., and Mr. C. H. Russell, for the National Bank of Australia.

Their lordships refused to hear more than two counsel for the respondents, accordingly,

Sir R. Baggalay, Q.C., and Mr. Cotton, Q.C., argued the case for the whole of the respondents: Neither Mrs. Aitkin nor her husband gave, in the interview with the manager of the bank, or intended to give, any security whatever for any overdraft of her private account. The letter of the 4th of April, 1862, cannot be considered an execution of the power given her by the settlement, of which settlement the bank, if they had not notice, could have ascertained, and it did not give the bank a lien or charge on Mrs. Aitkin's one-third share of the intestate's estate, nor on the funds comprised in the settlement, over which she had a general power of appointment. Mrs. Aitkin's liability, if any, is confined to her separate estate, and she could not enter into any other contract except as to it: *Shatlock v. Shatlock* ⁽⁵⁾; *Vaughan v. Vanderstegen* ⁽⁶⁾; *Hobday v. Peters* ⁽⁷⁾; *Johnson v. 584] Gallagher* ⁽⁸⁾; **Heatley v. Thomas* ⁽⁹⁾; *Stockett v. Wray* ⁽¹⁰⁾; *Hulme v. Tenant* ⁽¹¹⁾. Secondly, the relief sought by the bill is on the ground of fraud, and the allegations on that head are not proved. The other allegations of the bill alleging an in-

⁽¹⁾ 2 H. L. C., 440.

⁽²⁾ Law Rep. 1 H. L., 324

⁽³⁾ 10 Hare, 260.

⁽⁴⁾ 1 K. & J., 671.

⁽⁵⁾ Law Rep., 2 Eq., 182.

⁽⁶⁾ 2 Drew., 165, 363.

⁽⁷⁾ 28 Beav., 354.

⁽⁸⁾ 3 D. F. & J., 494.

⁽⁹⁾ 15 Ves., 596.

⁽¹⁰⁾ 4 Bro. C. C., 483.

⁽¹¹⁾ 1 Bro. C. C. 16; S. C. 2 Dick., 560 and see 1 W. & T. L. C., 431 [4th ed.]

formal execution of a power show no ground for equitable relief, and, therefore, the doctrine of equitable relief does not apply.

Their lordships' judgment was reserved, and was now delivered by THE LORD JUSTICE JAMES: The plaintiff in this case had certain dealings and transactions with one Anne Young Aitkin and her husband out of which the present claim arises. She was the widow and administratrix of one Jeremiah George Ware, deceased, who had died (as far back as October, 1859), intestate, possessed of property, real and personal, to a very large amount.

A suit was instituted in the Supreme Court of Victoria, for the purpose of administering that estate, and, in the course of that suit, a receiver and manager of the rents and profits of the real estate and stations of the intestate was appointed, but the administration of the personal estate by the administratrix was not otherwise interfered with by the court.

Mrs. Aitkin, then Mrs. Ware, employed the plaintiff as her bankers, and had two accounts with them: one her private account; the other her administration account, opened with her as Anne Ware, administratrix. The receiver kept his account with the same bank.

In March, 1862, she intermarried with Mr. Aitkin. Shortly after her marriage, she and her husband called at the bank, and at their request the two accounts were transferred to her by her new name, and on that occasion she signed a letter as follows: [His lordship read the letter, *ante*, p. 577, and proceeded:] And the husband signed his name to the words "I consent" written thereunder.

Afterwards, and up to the time of Mrs. Aitkin's death in June, *1867, very large sums were drawn out by her on her private account; and the same was overdrawn at that time to the extent of £13,438. But during the same period very large sums were paid in to the administratrix account, which were, from time to time, placed on deposit at interest with the bank. Amongst the sums so deposited were two sums of £6,000 and £8,000, which are especially the subject of this suit. After the death of Mrs. Aitkin an order was made for the transfer of the balance in the hands of the bank, belonging to the estate to the credit of the cause, and it is alleged, and appears to be the fact, that, in the first instance, the manager of the bank was minded to obey such order to its full extent, without setting up any claim to retain the deposits of £8,000 and £6,000, and "acted so as to make the receiver suppose that those sums were transferred as well as the other moneys in their hands, but before actual transfer the manager placed those two sums to a suspense

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account, insisting that he had a right to apply them to the overdraft on the private account."

Nothing material however appears to turn on this vacillation of purpose or on this conduct of the manager. The two sums had actually been placed on deposit by Mrs. Aitkin herself before the appointment of the receiver; the moneys were still in the hands of the bank, and nothing was actually done to affect the right (if the bank had the right) so to retain and apply those deposits. *Primâ facie* the bank had that right under the letter of Mrs. Aitkin concurred in by her husband. Whatever moneys were deposited by her after that letter were paid by her and received by the bank on the conditions contained in her letter, and the bank could not have been called on to pay over what they so received on the administratrix account until the private account had been first discharged, unless by some person having some better equity of which the bank had notice. Of course the bank had notice of one such equity from the very nature of the case, viz., that the moneys so paid in were assets of the intestate's estate, and might, therefore, be followed, if necessary, by the creditors of the deceased, and by the other next of kin beneficially entitled. But no such claim has been made by 586] either creditors *or next of kin as such, and it is abundantly clear and is admitted that there are other assets forthcoming far more than sufficient to answer all their claims, and that the overdrafts of Mrs. Aitkin are much less than her distributive share of the net residue. It would appear clear, therefore, that the bank had so far the right of retainer claimed by them.

It appears, however, that on the occasion of her marriage, and before the date of her letter, she had by marriage settlement settled her share of the residuary estate upon trusts under which several of the respondents claimed to have a preferable right to that share, including all her right and interest to and in the deposits of £8,000 and £6,000.

But, unless the bank had notice of that settlement, they cannot be affected thereby so as to deprive them of their right to retain moneys deposited with them under the circumstances above stated. There is a contest of fact as to whether, the bank had or had not such notice, the manager deposing that he never heard of it, the husband, on the other hand, deposing that it was distinctly mentioned to him at the interview when the letter was signed, and with reference to the arrangements then made. In this conflict of oath against oath, it would be impossible to hold that the fact of notice (the *onus* of proving which lies on the respondents) had been made out, and the probabilities arising from the surrounding circumstances and the transaction it-

self are in favor of the manager's statement and not the husband's. And this might be sufficient to dispose of the case so far as regards the right to the £14,000 now retained.

But it is not satisfactory to dispose of a case merely on the balance of such conflicting testimony, especially as in the arguments in the Supreme Court of the colony and here the case of the bank has been very much put on their rights derived under the settlement itself.

By that settlement it was agreed : " That, in pursuance of the said agreement, and in consideration of the said intended marriage, and of five shillings, she, the said Anne Young Ware, with the privity and consent of the said James William Maunifold Aitkin, assigned to the trustees the dower and estate, or right and title to dower, which the said Anne *Young [587 Ware hath or is or may be entitled to, or which may hereafter be assigned to her, in and out of all and singular or any part of the real estate of which the said Jeremiah George Ware, deceased, was seized, or to which he was beneficially entitled at the time of his decease : And all income or share of rental or produce which is now due, or which may hereafter become due and payable, or be assigned to the said Anne Young Ware, as or in respect of her said dower or right of dower : And all the estate, right, title, and interest of the said Anne Young Ware into and out of the same real estate, and all benefit and advantage thereof, To have, hold, receive, and take the said dower, estate, or right and title of or to dower and income, share of rental, and moneys in trust for the said Anne Young Ware, her executors, administrators, and assigns, until the said intended marriage : And from and after the solemnization thereof, upon trust, during the life of the said Anne Young Ware, to pay all moneys, rents or income which may come to the hands of such trustees, or trustee under or in respect of the said conveyance and assignment of dower or estate, right or title of dower hereinbefore contained unto the said Anne Young Ware, for her sole and separate use and benefit, exclusively and independently of her husband for the time being, and without being in any manner subject to his debts, control, interference, or engagements : And the receipts of the said Anne Young Ware alone shall, notwithstanding her coverture, be sufficient discharge for the said moneys, rents, or income, and she shall not have power to dispose or deprive herself of the benefit thereof by way of anticipation : And upon the death of the said Anne Young Ware, all moneys, rents or income which may have accrued or become due or payable in respect of such dower of her, the said Anne Young Ware, as aforesaid, and which may not have been received in her lifetime by the trustees or trustee for the time being under these presents,

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shall be held by them, upon trust for such person or persons, in such manner and for such purposes, as the said Anne Young Ware shall, notwithstanding coverture, by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil, from time to time appoint: And in default of and subject to every or any such appointment as aforesaid, in trust for the 588] *executors or administrators of the said Anne Young Ware absolutely as part of her personal estate: And Anne Young Ware, with the privity and consent of the said James William Manifold Aitkin, assigned all that the one equal third part or share, and all other the share and interest to which as the widow of the said Jeremiah George Ware, deceased, the said Anne Young Ware is entitled out of, in, and to all singular the personal estate of the said Jeremiah George Ware, howsoever constituted or invested, and of and in the moneys which have arisen, or which may arise, by the sale and conversion into money of the said personal estate of the said Jeremiah George Ware, deceased, or any part thereof; and the corresponding share to which the said Anne Young Ware is entitled, or the income produced by such personal estate in the meantime, and until the same shall be sold and converted into money; and also the share to which the said Anne Young Ware is or may be entitled, of and in the net profits arising from the use and employment of the said personal estate since the decease of the said Jeremiah George Ware, to hold the said parts or shares, and premises lastly hereinbefore assigned unto the said William George Lemprière and William MacRobie, the executors, administrators, and assigns, in trust for the said Anne Young Ware, her executors, administrators, and assigns, until the said intended marriage; and after the solemnization thereof, upon trust that the said William George Lemprière and William MacRobie and other the trustees and trustee for the time being acting under these presents, shall, with and out of any principal moneys which may come to their or his hands or hand by virtue of the assignment lastly hereinbefore contained, in the first place appropriate and set apart the sum of fifteen thousand pounds, and do and shall pay, transfer, assign, or otherwise dispose of the said sum of fifteen thousand pounds, or any part or parts thereof, and the stocks, funds, and securities in or upon which the same sum or any part thereof may, for the time being, be invested, and the dividends, interest, and annual produce thereof, or any part of the same respectively, to such person or persons, upon such trusts, for such intents and purposes, and in such manner as the said Anne Young Ware, notwithstanding her said intended coverture, by any deed or deeds, with or without power 589] of revocation and new *appointment, or by will or codicil,

shall, from time to time, direct or appoint: And in default of and until such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend to, and shall during the joint lives of the said Anne Young Ware and James William Manifold Aitkin pay, apply, and dispose of the said interest, dividends, and annual produce of the said sum of fifteen thousand pounds, or of the stocks, funds, or securities in or upon which the same may be invested, into the proper hands of her, the said Anne Young Ware, for her own sole and separate use and benefit, exclusively and independently of her said intended husband, and without being in any wise subject to his debts, control, interference, or engagements; and from and immediately after the decease of either of them the said Anne Young Ware and James William Manifold Aitkin, the said sum of fifteen thousand pounds, and the stocks, funds, and securities, upon which the same sum or any part thereof shall for the time being be invested, and the dividends, interest, and annual produce thereof respectively as shall have been unappointed and undisposed of by the said Anne Young Ware shall remain and be upon the trusts following, that is to say, if the said Anne Young Ware shall survive the said James William Manifold Aitkin, in trust for the said Anne Young Ware, her executors, administrators, and assigns, for her and their absolute use and benefit; but if the said James William Manifold Aitkin should survive the said Anne Young Ware, then in trust for the executors and administrators of the said Anne Young Ware as part of her personal estate."

It is admitted by all the adult defendants, that Mrs. Aitkin's share is much more than the £15,000 mentioned in the settlement, and as between the plaintiff and the infant defendant the question raised and argued is, which has the better right, the bank as creditors, or the infant as appointee under Mrs. Aitkin's will, she having by her will appointed the same between her husband and her children.

On the part of the bank it was contended that, whether the settlement was known to both parties, or was only known to the husband and wife, the letter must be considered to have been written honestly and with the intention of binding the deposits to *the extent of any interest which it was then [590 in her power to charge at law or in equity. The words in that letter "secured by my administration deposits in your hands," must have the same construction and effect as if the letter had gone on to say, "so far as I have power to charge them." She had, at that moment, power, by deed or will, to charge them to the full extent of the amount of her dower, and of the £15,000, and it is contended, and their lordships are of opinion, that the

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letter being in favor of purchasers for value is a sufficient and substantial, though informal, execution of the lady's power under the marriage settlement, and as to everything which she had power to dispose of by deed thereunder, and so that the claim of the bank would be paramount to the claims of any persons under her will. But it was very much pressed by the counsel for the respondents that no such case was made by the bill, and no such issue raised as that of the right to have an informal execution of a power supplied in equity. The facts, however, being all stated, the letter of charge, the settlement, and the will, the fact that the particular head of equity under which the plaintiff's claim is not distinctly charged does not appear to raise any very serious difficulty.

The issue is not one of fact; it is a conclusion of equity.

But, as it is true, that this view of the case is not in terms presented by the bill, and does not appear to have been considered in the colony, their lordships have thought it right to consider the questions which appear to have been argued and disposed of in the Supreme Court, and which may, in fact, have a material bearing on the rights of the defendants *inter se*.

The bank made and make the following case: We are, they say, creditors of a married lady having a separate estate, and a power for our purpose equivalent to a separate estate; and the lady having exercised that power by will in favor of volunteers, we the bank are entitled to be paid our debts out of the moneys appointed in priority to the volunteers.

The plaintiffs rely on the law as laid down by the Lord Justice Turner in *Johnson v. Gallagher* ⁽¹⁾. He there says that,

"Since the case of *Jones v. Harris* ⁽²⁾ there is not, so far as I am aware, any case opposed in any degree to the doctrine of the 591] *separate estate being liable for general engagements, except the case of *Aguilar v. Aguilar* ⁽³⁾, which followed *Jones v. Harris* ⁽²⁾, and the *dicta* of Sir John Leach in *Greatley v. Noble* ⁽⁴⁾, and *Stuart v. Lord Kirkwall* ⁽⁵⁾; and, on the contrary, the cases of *Murray v. Barlee* ⁽⁶⁾, *Owens v. Dickson* ⁽⁷⁾, *Burke v. Tuile* ⁽⁸⁾, *Vaughan v. Vanderstegen* ⁽⁹⁾, and *Wright v. Chard* ⁽¹⁰⁾, contain very decisive *dicta* in favor of such liability. The weight of authority, therefore, seems to me to be in favor of the liability. I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate is to be considered as a *feme sole*, is also in favor of it; and upon the whole,

⁽¹⁾ 3 D. F. & J., 513.

⁽²⁾ 9 Ves., 493.

⁽³⁾ 5 Madd., 414

⁽⁴⁾ 3 Madd., 79.

⁽⁵⁾ Ibid. 387.

⁽⁶⁾ 3 M. & K., 209.

⁽⁷⁾ Cr. & P., 48.

⁽⁸⁾ 19 Ir. L. Rep. (Eq.), 467.

⁽⁹⁾ 2 Drew., 165, 280, 203, 408.

⁽¹⁰⁾ 4 Drew., 673.

therefore, I have come to the conclusion that not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may interfere where the separate property is real estate. I am not prepared, however, to go the length of saying that the separate estate will, in all cases, be affected by a mere general engagement.

The cases of *Jones v. Harris* and *Aguilar v. Aguilar* show that the engagement which, if the married woman was a *feme sole*, the law would create for repayment of the consideration of a void annuity, would not affect it. It seems to follow that to affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must, I think, depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not, as I apprehend, affect it in the case of a married woman living with her husband. What might bind the separate estate if the credit be given to the married woman, would not, as I conceive, bind it if the credit be not so given. The very term 'general engagement,' when applied to a married woman, seems to import something more than mere contract, for neither in law nor in equity can a married woman be bound by contract merely: *Aylett v. Ashton* ⁽¹⁾. According to the best opinion which *I can form of a [592 question of so much difficulty, I think that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith or credit of that estate, and that whether it was so or not is a question to be judged of by this court upon all the circumstances of the case. . . . The separate estates of married women being thus far bound by their debts, obligations, and engagements, it has next become a question how far those debts, obligations, and engagements affect the *corpus* of the property where the married woman has a limited interest only, as, for instance, a power of a life estate with appointment. The cases on this subject may, as it seems to me, well be classed under three heads; first, where the power of appointment has been general, by deed or writing, or by will; secondly, where it has been by will only, and the power has been exercised; and, thirdly, where there has been a limitation in default of appointment, and the power has not been exercised. In cases falling under the third class there cannot, as it seems to me, be any reasonable doubt that the debts and engagements of the married woman cannot prevail against the parties entitled in default of appointment, and the case of

(1) 1 My. & Cr., 105.

Nail v. Punter ⁽¹⁾ impliedly decides that point. In cases falling under the second class, where the power of appointment is by will only, and has been exercised, but not for creditors, the authorities do not appear to me to be consistent. In *Norton v. Turvill* ⁽²⁾, as explained in *Socket v. Wray* ⁽³⁾, the exercise of the power by the will of the married woman seems to have been held to let in a bond-creditor against the appointees under the will; and in *Hughes v. Wells* ⁽⁴⁾ I seem to have intimated that this might be the effect of the exercise of the power, as in other cases of the exercise of the general power of appointment by will, and certainly not upon the ground that power is property. But the Vice-Chancellor Kindersley, in whose judgment I have quite as much confidence as in my own, seems to have dissented from *Hughes v. Wells* in the case of *Vaughan v. Vanderstegen* ⁽⁵⁾, and I observe that Sir William Grant has treated the point as 593] doubtful * in *Heatley v. Thomas* ⁽⁶⁾. I say no more, therefore, upon this point than that it may be considered as open. But in cases falling under the first class, where the power of appointment has been by deed, or writing, or will, the courts have certainly held the *corpus* of the property to be subject to the debts and engagements of the married woman."

It is said, indeed, that the Lord Justice Knight Bruce did not concur with his colleague, and that Lord St. Leonards has expressed an opinion, that the Lord Justice Knight Bruce's view was the more correct. It will be observed, however, that the point of difference was as to whether a general engagement could create the obligation—and not at all as to the second point, as to how far the obligation, if it exists, binds the *corpus* of property subject to a power of appointment in the married woman.

The term "general engagement" is an ambiguous and misleading one. If it is meant merely to say, that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate, *e.g.*, for buying or selling, or letting or hiring, a house, do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense, and to that extent, the proposition that her separate estate is not liable to her general engagements is quite accurate. But that does not affect the rule as laid down by Lord Justice Turner as to general engagements, as to which it appears that they were made with reference to and upon the faith or credit of the separate estate. It will be useful to refer to Lord Lang-

⁽¹⁾ 5 Sim., 555.

⁽²⁾ 2 P. Wms., 144.

⁽³⁾ 4 Bro. C. C., 483.

⁽⁴⁾ 9 Hare, 749.

⁽⁵⁾ 2 Drew., 165.

⁽⁶⁾ 15 Ves., 596.

dale's expressions, in *Tullett v. Armstrong*⁽¹⁾, quoted by the Lord Justice Turner in *Johnson v. Gallagher*⁽²⁾:

"It is perfectly clear, that when a woman has property settled to her separate use, she may bind that property without distinctly stating that she intends to do so. She may enter into a bond, bill, promissory note, or other obligation, which, considering her state as a married woman, could only be satisfied by means of her separate estate, and therefore the inference is conclusive that there was an intention, and a clear one, on her part that her separate estate, which would be the only means of satisfying the obligation into *which she entered, should [594] be bound. Again, I apprehend it to be clear that where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shows an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act" (3).

It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor, or a surveyor, or a builder, or tradesman, or hire laborers or servants, and very unjust, if she did, that they should have no remedy against such separate property.

It is true, that in *Shattock v. Shattock*⁽⁴⁾ the master of the rolls expressly overruled the judgment of the Lord Justice Turner, and held, that even a promissory note given by a married woman living separate and apart from her husband, and having property settled to her separate use for life, with a power to appoint the same by deed or will, and appointing it by will, was not a debt payable out of the property so appointed. In that judgment he bases his dissent from the Lord Justice Turner on the ground, that the authorities cited by the latter do not warrant his conclusion.

Their lordships are not able to concur in that view of the authorities, and have arrived at the conclusion, that Lord Justice Turner's judgment is expressed with his usual accuracy.

One of the cases, *Healey v. Thomas*⁽⁵⁾, when carefully examined, is a direct authority for the lord justice's proposition. There, a bond creditor of the married woman sought payment out of property appointed by her will. A doubt was raised in that case on the true construction of the settlement, as to whether it did in fact give her a power of disposal by deed or otherwise *inter vivos* as well as by will, and that doubt being re-

(1) 4 Beav., 319.

(2) 8 D. F. & J. 515.

(3) 3 D. F. & J., 515.

(4) Law Rep. 2 Eq., 182.

(5) 15 Ves., 596.

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solved in the affirmative, the plaintiff obtained the decree sought for by him. Sir William Grant's observations are these:

"The question is, whether this was separate property to all intents and purposes. In *Sockett v. Wray* ⁽¹⁾, Lord Alvauley did not consider a married woman who had only a power of appointment 595] by * will, as having separate property; distinguishing that case from *Norton v. Turvill* ⁽²⁾, where the creditor was allowed to resort to the separate property after the death of the wife, as she had a power of appointing either by deed or will. Upon the question in *Sockett v. Wray* ⁽¹⁾, whether the wife could give the property to her husband, Lord Alvauley held that she could not; that she could not affect it in any way but by a revocable instrument; and the bond was an instrument not revocable. If this was absolute separate property in Mrs. Johnson, upon the plaintiff's construction of the deed, that takes it out of the case of *Sockett v. Wray* ⁽¹⁾, and brings it to that of *Hulme v. Tenant* ⁽³⁾."

In that case it is obvious, that Sir William Grant considered that property settled to a married woman's separate use for life with power to dispose of it by deed or will, was, in effect, separate property. That case was in one respect a strong one, as there was no gift over except in the event of her dying in her husband's lifetime. She survived him, and, therefore, irrespective of the settlement, became again possessed of the property in her original right; so that upon the death of her husband the property stood settled to herself for life, remainder as she should by deed or will appoint, remainder to herself absolutely. But having property over which at the time of making the bond, she had absolute power of disposition notwithstanding her coverture, the bond by which, notwithstanding her coverture, she had bound herself, was decreed to be satisfied out of it.

In the present case it is to be noted, that the gift is to the married woman for her separate use for life, with remainder, as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors or administrators. Their lordships are satisfied, that on the weight of authority and on principle they ought to treat this as what in common sense, and to common apprehension, it would be, an absolute gift to the sole and separate use of the lady. The words are an expansion and expression of what would be implied in the word "sole and separate use;" and they conceive themselves at liberty to hold that such a form of gift to a married woman, without any re- 596] straint *on anticipation, vests, in equity, the entire *corpus* in her for all purposes, as fully as a similar gift to a man would vest it in him.

⁽¹⁾ 4 Bro. C. C., 483

⁽²⁾ 2 P. Wms., 144.

⁽³⁾ 1 Bro. C. C., 16.

In the Supreme Court of Victoria the question appears to have been discussed and determined mainly on the applicability or non-applicability of the case of *Vaughan v. Vanderstegen* ⁽¹⁾, which it is necessary, therefore, to consider. In that case the married woman had only power to appoint by will. The vice chancellor held, that a creditor was not entitled to be paid out of property appointed by such will, but on a second hearing held, that where a fraud had been practised on the creditor, he was so entitled. His reasoning was shortly this: the fraud created an equitable demand which would have been enforced against any property of the married woman, and that being so, it would, like a man's debt, be payable not only out of her own assets, but in aid of them out of any property which she had a general power to appoint, and had actually appointed.

It is not easy to see on what principle the fraud could alter the nature of the property subject to appointment or affect the appointees. It is easy to see how fraud might make that a debt to which the married woman would be in equity liable notwithstanding her coverture, and that there being such a liability or debt, equity would deal with any property to which she was, notwithstanding coverture, absolutely entitled, and any property over which she had a general power of appointment, exactly as it would do in the case of a man or *feme sole* dying indebted. Given the relation of debtor and creditor in equity, all the consequences of such relation would appear to follow just as if there were no coverture in the case.

But the case of *Vaughan v. Vanderstegen* was before the Lord Justice Turner in *Johnson v. Gallagher* ⁽²⁾, and it was with the full knowledge of that case, and after having had the advantage of well weighing the judgment of Vice Chancellor Kindersley, that the Lord Justice Turner laid down the propositions which have been previously cited, and the concurrence of their lordships with which has been above stated.

It appears to their lordships, therefore, that it was not necessary for the plaintiff to make out a case of fraud. All that was *necessary was to show that the married woman intended [597 to contract so as to make herself, that is to say, her separate property, the debtor, and upon the facts of this case that does not appear to be open to any substantial doubt. Assuming for the moment that the letter did not operate as a defective execution of her power, it at all events showed unequivocally that she contracted that her interest in the intestate's estate, i.e. her separate property, should be liable to the debt.

In the Supreme Court it was considered sufficient to say, that the case was based entirely on fraud, and that the fraud not

(1) 2 Drew., 165, 363.

(2) 3 D. F. & J., 515.

being proved, the bill ought to be dismissed with costs. Their lordships agree that the fraud was not proved. They are satisfied that the non mention of the settlement (if it was not mentioned) was perfectly honest. The lady and her husband well knew that what she had reserved to herself would be an ample security for anything which she was likely to overdraw pending the winding up of the estate, which probably was protracted for many more years than they contemplated, and the lady and her husband (as their lordships are satisfied) honestly intended to give, and did give, that ample security.

It may be right, in order to avoid any possible misapprehension of the judgment of the Supreme Court, to say a few words on the effect of a charge of fraud made and not proved. If the case is based on the fraud, the failure to prove it must be, like the failure to prove any other essential ingredient, fatal. But if striking out the charge of fraud there is sufficient equity stated and proved, if, as in this case, the fraud is thrown in by way of subsidiary answers to the counter case of the defendants, it is a matter only affecting costs.

Their lordships are of opinion, that on each of the several grounds stated above, the plaintiff is entitled substantially to the relief asked in the second and third paragraph of the bill.

The injunction asked was probably not necessary, as it is difficult to see how any action at law could be sustained; but it was however proper, as the action at law could not have properly tried the real questions between the parties, which were as to their respective priorities over the separate trust estate of a *feme covert*. As to the costs of the proceedings, of course, the costs paid by the plaintiff must be repaid to him. As to his 598] own costs their lordships are of opinion, having regard to the nature of the suit and claim, that the proper order will be, that they should add their costs to their debt. Their lordships will, therefore, humbly recommend to Her Majesty as follows: That the orders of the Supreme Court of Victoria ought to be discharged, and in lieu thereof a declaration made that the shares to which Anne Young Aitkin (formerly Ware) was entitled as widow of the intestate in his personal estate, to the extent of the £15,000 mentioned in the settlement, and the moneys payable in respect of her dower in his real estate, are liable to make good the sum due to the plaintiff, with interest as aforesaid in respect of the said overdraft. And that until such overdraft is fully paid, the plaintiff has a lien upon and is entitled to retain the said deposits of £8,000 and £6,000, as representing a part of the sum of £15,000 as security for the same.

That an account be taken of what was due in respect of the

overdraft in the bill mentioned for principal and interest up to the time when the deposited sums of £8,000 and £6000 were carried to a suspense account and a like account of principal and interest on those sums up to the same date, and the balance at that date, ascertained. That the taxed costs of the plaintiff of the suit in the courts below and of this appeal be added to or set off against such balance as the case may be. Any balance due from the bank to be paid to the legal personal representative of Mrs. Aitkin; and as to any balance due to the bank, they are to be at liberty to apply, as they may be advised, in the administration suit, for payment out of her share of the intestate's estate, to the extent of the said sum of £15,000 and the arrears of dower. And the decree is to be without prejudice, as to how, as between the persons interested under the settlement and will, and as respects any other estate of Mrs. Aitkin, the debt of the bank ought to be borne.

That the costs paid by the plaintiff to any parties be repaid to him.¹

Solicitors for the appellant: Messrs. *Freshfields*.

Solicitors for the respondents: Messrs. *Murray & Hutchins*; Messrs. *Sladen & Mackenzie*, and Messrs. *Wadson & Malleson*.

(1) See Moak's Van Santvoord's Pleadings, 371-3 id. 688; a wife may have full knowledge that a husband is about building a house on her real estate and may consent thereto and approve thereof, but this gives the builder

no right to acquire a lien upon the property. To render it liable she must have done what would have made her personally liable as a *feme sole*. *Cupp v. Stewart*, 38 Ind., 479.

[Law Reports, 4 Privy Council Cases, 599.]

J. C.,* March 11, 1873.

*OUR SOVEREIGN LADY THE QUEEN, Appellant; and ED- [599
WARD COOTE, Respondent.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Lower Canada, law of—Felony—Evidence—Depositions taken on Oath, before Trial on a criminal charge—New Trial—Canadian Statute, 32 & 33 Vict. c. 29, s. 80—Practice—Leave to appeal in a criminal case.

According to the English law, introduced into Lower Canada at the time of the cession of Canada to England in 1763, and unaffected by subsequent Canadian or imperial statutes, the depositions on oath of a witness legally taken are admissible evidence against him, if he is subsequently tried on a criminal charge.

The only exception is, in the case of answers to questions which he objected to when his evidence was taken as tending to criminate him, but which he has been improperly compelled to answer.

*Present: SIR JAMES WILLIAM COLVILLE, SIR BARNES PEACOCK, THE LORD JUSTICE MELLISH, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

A. was indicted for felony. At the trial the crown put in evidence depositions sworn to by him, without being cautioned that what he so deposed to might be given in evidence against him, before fire commissioners empowered by the Quebec statutes, 31 Vict. c. 31, and 32 Vict. c. 29, to investigate the origin of any fires occurring in Quebec, and before any charge or accusation had been made against him.

Held, that the depositions were properly admitted as evidence against the prisoner at the trial.

Semble: Chap. 77, s. 63, of the Consolidated Statutes of Canada, giving the Court of Queen's Bench power to direct a new trial, is repealed by the Canadian Statute, 32 and 33 Vict. c. 29, s. 80.

On petition by the attorney-general of the Province of Quebec, special leave to appeal granted from a judgment of the Queen's Bench, Quebec, on a case reserved in a trial for felony.

IN this case special leave to appeal was granted from a judgment in the Court of Queen's Bench of the Province of Quebec, Canada, on a case reserved for that court by Mr. Justice Badgley, under the powers of the Consolidated Statutes of Lower Canada, c. 77, ss. 57 and 58 ⁽¹⁾ on a trial of the respondent for arson.

[600] *The case so reserved by Mr. Justice Badgley was as follows: "The prisoner, Edward Coote, was indicted for arson of a warehouse in his occupation; and belonging to Alexander Roy.

"The indictment contained four counts: The first, with intent to defraud the Scottish Provincial Insurance Company; second, to defraud the Royal Insurance Company; the third, to defraud generally; and the fourth to injure generally. Upon his plea of not guilty he was tried before the Court of Queen's Bench, at the criminal term of the said court, holden by me at Montreal, before a competent jury, empanelled in the usual manner, and after evidence adduced by the crown and by the prisoner, was found guilty, the jury returning a general verdict of guilty.

⁽¹⁾ By the Consolidated Statutes of Lower Canada, c. 77, s. 57, it is provided, that when any person has been convicted of any felony at any criminal term of the Court of Queen's Bench, the court before which the case has been tried may in its discretion reserve any question of law which has arisen on the trial for the consideration of the Court of Queen's Bench on the appeal side thereof, and may thereupon postpone the judgment until such question has been considered and decided by the said Court of Queen's Bench.

By sect. 58, the said court shall thereupon state in a case, to be signed by the presiding judge, the question or questions of law, with the special circumstances upon which the same have arisen. The said Court of Queen's

Bench shall have full power and authority at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine any question therein; and thereupon to reverse, amend, or affirm any judgment which has been given on the indictment on the trial of which such question arose, or to avoid such judgment, and order an entry to be made on the record that in the judgment of the said Court of Queen's Bench the party convicted ought not to have been convicted, or to arrest the judgment, or to order the judgment to be given thereon at some other criminal term of the said court, if no judgment has before that term been given, as the said Court of Queen's Bench is advised, or make such other order as justice requires.

"In the course of the adduction of the evidence for the crown, two depositions made and sworn to by the prisoner, with his signature subscribed to each, taken by the fire commissioners ⁽¹⁾ at their investigation into the cause and origin of the fire at his *warehouse, before any charge or accusation against him [60] or any other person had been made, were produced in evidence, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection previously made by the prisoner to their production in evidence, and after his said objection had been overruled; after the conviction of the prisoner, and before sentence was pronounced by me thereon, he moved the court by two motions filed in court in the terms following:"

The case then set out the two motions, of which the first is immaterial, as Mr. Justice Badgley rejected it, and reserved no question respecting it; the second was in the following terms:

"Motion on behalf of the said Edward Coote, that judgment upon the said indictment, and upon a verdict of guilty thereon, rendered against him, be arrested, and that the said verdict be quashed and set aside, and the said defendant, to wit the said Edward Coote, be relieved therefrom, for, among others, the following reasons."

A great many reasons were then set out, the only ones material to the present appeal being, that the two depositions were inadmissible in evidence, because the fire commissioners before whom they were taken had no authority to administer an oath, or take such depositions, and such depositions were not admissible as statements made by the prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an oath.

The case then stated the rejection of the first motion, and that the judge, though himself considering the reasons given insufficient to support the second motion, yet, as doubts might be held by the Court of Queen's Bench as to the legal production of the depositions, reserved it, and held it over for decision with reference to the admission of the depositions by the Court of Queen's Bench.

The reserved case came on for argument in the Court of Queen's Bench, appeal side, before the Chief Justice Duval, and the Justices Caron, Drummond, Badgley, and Monk; and on the 15th of March, 1872, the court gave judgment in the following terms: "After hearing counsel as well on behalf of the

(1) The fire commissioners, before whom the depositions were taken, were appointed under the Statutes of the Provincial Legislature of Quebec, 81 Vict. c. 32, and 82 Vict. c. 29. In pursuance of those statutes they were empow-

ered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses, and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause.

prisoner as for the crown, and due deliberation had, on the case [602] transmitted to *this court from the Court of Queen's Bench, sitting on the crown side at Montreal, it is considered, adjudged, and finally determined by the court now here, pursuant to the statute in that behalf, that an entry be made on the record to the effect, that in the opinion of this court the production of the depositions made by the prisoner before the five commissioners at Montreal was illegal, and, therefore, that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set aside.

"But this court, considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, Edward Coote, be tried anew on the indictment found and now pending against him, as if no trial had been had in the case; and that for the purpose of standing such new trial he be bound over in sufficient recognizance to appear on the first day of the next ensuing term of the Court of Queen's Bench, sitting on the crown side, at Montreal, and thereafter, from day to day, until duly discharged."

From this judgment the Justices Badgely and Monk dissented.

The prisoner was discharged on his recognizance to appear on a new trial.

An application made by the attorney general for the Province of Quebec, to the Court of Queen's Bench, for leave to appeal to Her Majesty in council from this judgment, was refused. A petition was then presented by the attorney general of Quebec to the Queen in council, praying for special leave to appeal from the above judgment. The petition was heard by the judicial committee on the 30th of April, 1872.

April 30, 1872.*

Sir *R. Pulmer*, Q.C., and Mr. *H. M. Bompas*, for the petitioner.

Their lordships granted the application; and by an order in council, dated the 10th of May, 1872, special leave to appeal from the judgment of the Court of Queen's Bench of the 15th of March, 1872, was granted.

[603] *As no appearance was entered for the respondent, the appeal was heard *ex parte*.

Sir *John Karlake*, Q. C. (Mr. *H. M. Bompas* with him), for the appellant: This case is governed by English law. The

* *Present*: SIR JAMES WILLIAM COLVILLE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

criminal law of England was introduced into Canada at the time of the cession of Canada to England, in the year 1763, and the criminal law of England at that time still continues in force, except so far as it has been altered by Canadian or imperial statutes applicable to Canada. Statutes of Quebec, 31 Vict. c. 32, s. 3, and ss. 4, 6, and 7, s. 5, and s. 8. Our contention is, that the depositions of the prisoner were properly received in evidence by the judge before whom the indictment was tried. The fire commissioners before whom the depositions were taken, had under the provincial statutes, 31 Vict. c. 32 and 32 Vict. c. 29, power to compel the attendance of witnesses, to examine them on oath, and also to commit for contempt. Such depositions were admissible in evidence against the prisoner, although made on oath by him as a witness whose attendance might have been compelled, and without caution that his statement might be given in evidence against him: Russell on Crimes, Vol. III. p. 418 [4th ed.], where the cases are collected; Taylor on Evidence, Vol. I., p. 743 [3d ed.]; Roscoe's Criminal Evidence, p. 62 [7th ed.]; Joy on Confess., pp. 62, 68; *Rex v. Garbett* ⁽¹⁾; *Reg. v. Lewis* ⁽²⁾; *Reg. v. Haworth* ⁽³⁾; *Reg. v. Goldshede* ⁽⁴⁾; *Reg. v. Sloggett* ⁽⁵⁾; *Reg. v. Chidley and Cummins* ⁽⁶⁾; *Reg. v. Gillis* ⁽⁷⁾.

There was no substantial ground for moving an arrest of judgment, nor had the court power to award a new trial. chapter 77, s. 63, of the Consolidated Statutes of Lower Canada, gave the Court of Queen's Bench power to direct a new trial; but that statute was repealed by a subsequent statute, 32 & 33 Vict. c. 29, s. 80, which section contains no power authorizing the Court of Queen's Bench to grant a new trial in a criminal case.

*At the conclusion of Sir John Karslake's argument [604 their lordships intimated that, if necessary, they would call on Mr. Bompas. He was not called on and

March 18, 1878.

Judgment was now delivered by SIR ROBERT COLLIER: Edward Coote (the respondent) was convicted of arson, subject to a question of law reserved by Mr. Justice Badgley (the judge who presided at the trial) for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of c. 77, sect. 57, of the Consolidated Statutes of Lower Canada. The question reserved was, whether or not the prosecutor was entitled to read

⁽¹⁾ Den. C. C., 236.

⁽²⁾ 6 C. & P., 161.

⁽³⁾ 4 C. & P., 254.

⁽⁴⁾ 1 C. & K., 657.

⁽⁵⁾ Dears. C. C., 656.

⁽⁶⁾ 8 Cox's C. C., 365.

⁽⁷⁾ 17 Ir. C. L. Rep., 512.

as evidence against the prisoner depositions made by him under the following circumstances :

An act of the Quebec legislature appointed officers named "fire marshals" for Quebec and Montreal respectively, with power to inquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any judge of session, recorder, or coroner, to summon before him and examine upon oath all persons whom he deemed capable of giving information or evidence touching or concerning such fire." These officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a justice of the peace.

Upon an inquiry held in pursuance of this statute as to the origin of a fire in a warehouse of which Coote was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the record, but their lordships accept the following statement of Mr. Justice Badgley as to the circumstances under which they were taken :

"Among the several persons examined respecting that fire was Coote himself, upon two occasions, at an interval of three or four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and *which was attested by the commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions. Some days after the date of the latter deposition, and after the final close of the inquiry, Coote was arrested upon the charge of arson of his premises, and duly committed for trial."

At his trial the above-mentioned depositions were duly proved, and admitted in evidence, after being objected to by the counsel for the prisoner. The objection taken at the trial appears to have been, that to constitute such a court as that of the fire marshal was beyond the power of the provincial legislature, and that consequently the depositions were illegally taken. Subsequently, other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole court (in their lordships' opinion rightly), that the constitution of the court of the "fire marshal," with the powers given to it, was within the competency of the provincial legislature; but it was further held by a majority of the court that the depositions of the pris-

oner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be given in evidence against him, after the manner in which justices of the peace are required to caution accused persons by an act of the British parliament adopted in this respect by the colonial legislature. The court held the conviction to be bad, but, inasmuch as the objection to it was not founded on the merits of the case, made an order directing a new trial.

Their lordships are unable to concur in what appears to be the view of one of the judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a prisoner of statements made by him upon oath is so unsettled, that every judge is at liberty in every case to act upon his own individual opinion.

It is true that doubts have, from time to time, arisen on this subject, and that conflicting *dicta*, and indeed decisions, may be *found upon it; but, in their lordships' opinion, all such [606] doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been, if properly understood.

In the case of *Rex. v. Haworth* ⁽¹⁾ a deposition on oath made by the prisoner as a witness against a person named Shearer, on a charge of forgery, was received in evidence by Mr. Justice Parke against the prisoner, on an indictment for forgery. In *Reg. v. Goldshede and another* ⁽²⁾, Lord Denman admitted against the defendants, on a charge of conspiracy, answers which they had made on oath in a suit in chancery. In *Reg. v. Sloggett* ⁽³⁾ the prisoner was examined in the court of bankruptcy, under an adjudication against him, and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the commissioner to consider himself in custody. On a case reserved, it was held by the court of criminal appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case, Jervis, C.J., observes, "The test is, whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In *Reg. v. Chidley and Cummins* ⁽⁴⁾, Cockburn C.J., admitted a deposition made by Cummins, when Chidley alone was accused of the offense for which they were afterwards both tried. The learned editor of the 4th edition of "Russell on Crimes" thus reports a case of *Reg. v. Sarah Chesham* ⁽⁵⁾.

⁽¹⁾ 4 C. & P., 254.

⁽²⁾ 1 C. & K., 657.

⁽³⁾ Dears. C. C., 656.

⁽⁴⁾ 8 Cox's C. C., 365.

⁽⁵⁾ Russell on Crimes, vol. iii, p. 418 [4th Ed.].

"Where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stat[ed], that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion; no charge had at that time been made against her; she made a statement on oath, which the coroner took down in writing. Lord Campbell, C.J., after consulting Parke B., admitted the statement, and the prisoner was convicted and executed."

607] *The case of *Reg v. Garbett* (1) accords with the foregoing. There the prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled, and he was compelled to answer. It was held by a majority of the judges on a crown case reserved that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible.

The case of *Reg. v. Scott* (2) seems to go somewhat further. It was then held by the court of criminal appeal (Coleridge, J., dissenting) that although, under the Bankruptcy Act then in force (12 & 13 Vict. c. 106), the bankrupt was bound to answer certain questions, notwithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the improper exercise of judicial authority.

From these cases, to which others might be added, it results, in their lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "*nemo tenetur seipsum accusare*," but does not apply to answers given without objection, which are to be deemed voluntary.

The chief justice indeed suggests, that Coots may have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coots was acquainted with so much of the law; but be this as it may, it is obvious, that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their lordships see no reason to introduce, with reference to this subject,

(1) Den. C. C., 286.

(2) Dears. & B. C. C., 37.

an exception to *the rule recognized as essential to the ad- [608
 ministration of the criminal law, "*Ignorantia juris non excusat.*"
 With respect to the objection, that Coote, when a witness should
 have been cautioned in the manner in which it is directed by
 statute, that persons accused before magistrates are to be cau-
 tioned (a question said by Mr. Justice Badgley not to have been
 reserved, but which is treated as reserved by the court), it is
 enough to say, that the caution is by the terms of the statutes
 applicable to accused persons only, and has no application
 whatever to witnesses. If, indeed, the fire marshal had exercised
 the power which he possessed of arresting Coote on a criminal
 charge (but which he did not exercise), then it would have been
 proper to caution him before any further statement from him
 had been received.

A question has been raised on the part of the crown, whether
 or not the court had the power of ordering a new trial, inasmuch
 as c. 77, s. 68, of the Consolidated Statutes of Canada, giving
 the court power to direct a new trial, has been repealed by the
 subsequent statute, 32 & 33 Vict. c. 29, s. 80, which does not
 itself in terms confer any such power, but in the view which
 their lordships take of the case it becomes unnecessary to de-
 termine this question.

For the reasons above given, their lordships will humbly ad-
 vise Her Majesty, that the judgment made by the Court of
 Queen's Bench be reserved,—that the conviction be affirmed—
 and that the Court of Queen's Bench be directed to cause the
 proper sentence to be passed thereon.

By an order in council, it was ordered, that the judgment of
 the Court of Queen's Bench of the 15th of March, 1872, be re-
 versed, and the conviction of the respondent, Edward Coote,
 affirmed, and the Court of Queen's Bench, Province of Lower
 Canada, was directed to cause the proper sentence to be passed
 thereon.

Solicitors for the appellant: *Bischoff, Bompas, & Bischoff.*

Upon a trial for murder, statements
 made by the prisoner as a witness, at
 the coroner's inquest upon the body of
 the deceased, before the witness had
 been charged with the murder, and be-
 fore it had been ascertained that a mur-
 der had been committed, are admissible
 in evidence against him. *Hendrickson*
v. People, 9 N. Y., 13; 9 How. Prac.
 Rep., 155, affirming 1 Park. Cr. Rep.,
 396, 8 Howard's Practice Reports, 404;
 (but see *State v. Matthews*, 66 N. C. Rep.,
 106.)

Otherwise where the prisoner had

been arrested by a constable, although
 without warrant. The admissibility, or
 non admissibility, of the evidence turns
 upon the question whether the circum-
 stances of the prisoner, when examined,
 were such as to render his testimony
 reliable. A judicial oath administered
 when the mind is agitated and disturbed
 by a criminal charge may prevent free
 and voluntary mental action, and this
 is the reason for excluding evidence
 thus given. *People v. McMahon*, 15 N.
 Y., 384, reversing 2 Parker Cr. Rep.,
 663.

In speaking of the latter case it was said, in *People v. Wentz*, (37 N.Y., 304-5), that the distinction is between a statement or declaration, made before and one after the accused was conscious of being charged with or suspected of the crime. If before, it is admissible in all cases, whether made under oath or without, upon a judicial proceeding or otherwise; but if made afterwards, the law becomes at once cautious and hesitating. The inquiry then is, was it voluntary? For unless entirely voluntary, it is held not to be admissible. The word "voluntary" is not in all cases used in contradistinction to compulsory, but as proceeding from the spontaneous suggestions of the party's own mind, free from the influence of any extraneous disturbing cause.

But the Court of Appeals of New York in *Teachout v. People* (41 N.Y., 7), discarded any distinction except that whether the party was at the time he gave his evidence under arrest for the crime, so that he stood before the coroner as a party in fact charged with the crime, and was then subjected to

examination on oath, touching his own guilt or innocence.

But if the prisoner were not under arrest, his testimony would not be admissible if obtained by promises or inducements which would render a confession inadmissible. *People v. Phillips*, 42 N.Y., 200, 203.

Although the mere fact that a prisoner is under arrest, will not render a voluntary statement by him inadmissible. *People v. Wentz*, 37 N.Y., 303; *People v. Montgomery*, 13 Abb., N. S., 209.

The reporter is not, however, correct in the latter case, in saying that *McMahon v. People* is overruled by the case of *Teachout v. The People*. It was simply distinguished.

Perhaps as clear a statement as can be made of the rule is, that a confession, voluntarily made by one under arrest, charged with a crime, is admissible, but that the testimony of one under arrest, charged with the crime, is not voluntary, but rendered under the compulsion of an oath and the authority and majesty of a court of justice, or of a judicial examination.

C A S E S

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND, BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXVI VICTORIA.

[Law Reports, 8 Queen's Bench, 161.]

[IN THE EXCHEQUER CHAMBER.]

Feb. 3, 1873.

*GEE v. THE METROPOLITAN RAILWAY COMPANY. [161]

Railway Company — Negligence — Evidence of Defendants' Liability — Contributory Negligence — Nonsuit.

In an action against the defendants for negligence it was proved that the plaintiff, being a passenger on defendants' railway, got up from his seat and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station, and that the pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evidence as to the condition of the door and its fastenings. The jury having found for the plaintiff, leave being reserved to enter a nonsuit on the ground that there was no evidence of the defendants' liability:

Held, by the Queen's Bench and Exchequer Chamber, that there was evidence, and that the verdict ought to stand.

Quære, how far the question of contributory negligence is open in such cases.
Adams v. Lancashire and Yorkshire Ry. Co. (Law Rep., 4 C. P., 789), questioned.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendants or a nonsuit.

Declaration that the plaintiff was a passenger on defendants' railway to be safely carried; that defendants so negligently conducted themselves in carrying plaintiff and managing the carriage in which plaintiff traveled, that plaintiff fell out and was injured.

Plea, not guilty; issue joined.

The following is the substance of the case, as stated on appeal :

At the trial before Cockburn, C.J., at the sittings in Middlesex, after Trinity Term, 1871, the following facts were proved :

On the 10th of January, 1870, the plaintiff, in company with his brother, took a second class ticket from the Victoria Station to the Aldersgate Street Station, on the Metropolitan Railway. The plaintiff and his brother entered an empty compartment of a second class carriage of a train of the defendants at the Victoria Station, which had come from Westminster and was about to start for the Aldersgate Street Station. The plaintiff's brother seated himself on the left hand, or near side of the carriage, and the plaintiff on the right hand side, or off side, nearest the six-foot way.

162] *Across the windows of the carriages in use on the railway there is a small brass rod, or bar.

Some conversation having arisen between the plaintiff and his brother with respect to the mode of signalling in use on the defendants' railway, as the train was approaching the Sloane Square Station, the plaintiff stood up, with the intention of observing the signal lights at the station.

The following was the plaintiff's evidence in chief: "I said to my brother, 'If you look out when I tell you, you will see the lights for Sloane Square.' I stood up and took hold of the small brass bar across the window of the off-side door of the carriage. It immediately flew open as soon as I touched the bar. My purpose in looking out was to see and to tell my brother when the lights were in view so that I could see them. As soon as I took hold of the bar and leant a little forward the door flew open and I fell out; as soon as I leant on it the door flew open. I tried to get hold of the bar on which I placed my hands, but I could not. The door could not have been fastened. I went on to the foot-board of the carriage first. I could not sustain myself, and fell on to the ground on my right side. How long I was there I do not know, I can give no idea of the time; I can remember falling, and then I remember some one falling over me; that is the first recollection I remember. That was after the train had left. It was my brother; he moved me out of the way, and then came back for some one. We were in the tunnel when I fell out. It was some short distance from the Sloane Square Station where I fell out; before we quite reached it. One of the men asked me how I had fallen out. I told him that I had simply leant against the door, and the door had given way with me. He said it was the fault of those fellows at Westminster; there would be a devil of a row about it. If the train I came by had returned, the side on which I was then

would have been the near side next the platform. Two of the company's people assisted me to the Sloane Square Station."

On cross examination: "I got up for the purpose of seeing the signal lights. I took hold of the cross bar that is across the window; I was going to look out. My object was to put my head out sufficiently to see the lights. When I looked over the bar I was holding it specially to see the light, and I pressed * with my hands against it slightly. I was standing, and [163 took hold of the bar, and leaning slightly; my brother was still sitting at the other side of the carriage. The bar did not break, to the best of my knowledge; I do not remember its breaking; I am quite sure it did not break. I heard some things that my brother said: I think I heard nearly all he said at Sloane Square. I never heard him say that I had got hold of the bar, and that the bar broke. Having hold of the bar the door gave way, and then I tumbled out. I did not try to look out on that side before I stood up. I said, 'If you will look out when I tell you to look out, you will see the signals;' I think that was the expression. I was going to look out; I was accustomed to the line; I was explaining to him, to the best of my ability, the system of signalling on the line, and I said to him, 'If you look out when I tell you, you will see the lights for Sloane Square.' And then I put my hand on the bar and fell out; that was the way in which it was done."

There was no further evidence given as to the condition of the door or its fastenings from the time the train left Westminster till the time of the accident, nor as to whether it was totally unfastened or only imperfectly fastened.

At the conclusion of the plaintiff's case, it was submitted on behalf of the defendants, that the plaintiff was not entitled to recover, and the chief justice reserved to the defendants leave to enter a verdict for them or a nonsuit. The defendants did not offer any evidence, and the plaintiff then had a verdict for 250*l.* (1)

A rule was afterwards obtained to enter the verdict for the defendants or a nonsuit pursuant to the leave reserved, on the ground that there was no evidence of liability of the defendants; or for a new trial, on the ground that the verdict was against the weight of evidence.

Jan. 11, 1872. *Huddleston, Q.C.*, and *L. Kelly*, showed cause. The proper inference to be drawn from the facts is, that the door of the *carriage was left unfastened by the defend- [164

(1) The above is the statement in the case on appeal. In the Court of Queen's Bench it appeared that the chief justice left two questions to the jury: first, whether there was negligence on the part of the defendants in not properly fastening the door; secondly, whether there was negligence or improper or imprudent conduct on the part of the plaintiff.

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ants' servants; there was therefore *prima facie* evidence of negligence on the part of the defendants. The plaintiff was not guilty of contributory negligence; he put his hand on the door, which he had a right to believe was securely fastened, for the purpose of looking out of the window, a perfectly legitimate act, when the door, owing to the neglect of the servants of the company in not having fastened it, flew open, and the plaintiff was injured. The case is distinguishable from *Adams v. Lancashire and Yorkshire Ry. Co.* (1). There the plaintiff put himself in peril in attempting to shut the door of the carriage which he knew was open. He voluntarily did an act obviously dangerous. That is a totally different case from the present.

M. Chambers, Q.C., and *W. G. Harrison*, in support of rule. The contract of the railway company was safely and securely to carry the plaintiff on a journey from one place to another. If the plaintiff had sat still in his place in the carriage the company would have fulfilled their contract. The company are not responsible for an accident caused by the voluntary acts of a passenger during the journey. The plaintiff must show that negligence of the defendants was the immediate cause of the injury; whereas it was by the plaintiff's own act that the accident occurred. The damages must legitimately flow from the breach of contract; it cannot be said that by reason of the defendant's negligence the plaintiff was injured; the whole mischief resulted from the plaintiff's own act: *Siner v. Great Western Ry. Co.* (2), *Bridges v. North London Ry. Co.* (3).

COCKBURN, J. I am of opinion that this rule should be discharged. The facts are simple. The plaintiff and his brother were traveling as passengers on the defendant's railway. In the carriages of that railway there is a bar across the window to prevent persons from putting their heads to more than a small extent out of the window. The plaintiff and his brother had been conversing as to the signals used on the line, and the [165] plaintiff was *explaining the mode in which they were worked; and told his brother he would show him how it was done; and as soon as the lights of the station were visible the plaintiff stood up and put his hand on the rod of the window, and it so happened that the door, having been left insecurely fastened, flew open, and the plaintiff was thrown out and injured. Under these circumstances are the defendants liable? We must take it that there was negligence in not securely fastening the door; but it is said that that negligence alone did not cause the accident; the proximate cause of the accident was the plaintiff pressing against the door.

(1) Law Rep. 4 C. P., 739. (2) Law Rep., 3 Ex., 150; in error, Law Rep., 4 Ex., 117

(3) Law Rep., 6 Q. B., 877.

It is said that the duty of the company is to carry a passenger safely as long as he sits quietly in the carriage; and if an accident happens from any act of his inconsistent with the ordinary behavior of passengers, he has only himself to thank, and the company are not liable. I quite agree that the passenger must not do anything inconsistent with what passengers ordinarily do on a journey. *Adams v. Lancashire and Yorkshire Ry. Co.* ⁽¹⁾ was cited for the defendants. That case was decided on a right principle, which was this: that, though the plaintiff was exposed to some inconvenience by the door opening, he ought to have borne that inconvenience, and not put himself in danger. I agree with the judgment of my brother Brett; he says: "I think on the whole that this was not a proper case to go to the jury, though at the trial I thought there was sufficient evidence for them to act upon: I think the jury were justified in finding that the defendants were negligent; but the immediate result of their negligence was not any peril to the plaintiff, but only considerable inconvenience. It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person incurring danger in an attempt to get rid of it. I confess I am not prepared to go to that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience. I think here the jury might well find that there was no obvious danger, and that the act was not carelessly done; but I think the inconvenience was not so great as [166 to make it reasonable for the plaintiff to get rid of it in this way. . . . There was no evidence of the weather being bad, and in three minutes the train would have arrived at the next station. I think therefore there was no great inconvenience; and though the danger was not obvious, I think it could not be said that the act was not dangerous in itself; and, under these circumstances, I think the putting himself into peril was contributory negligence, and that the case, therefore, ought not to have been left to the jury." There the decision turned on the passenger committing an act of imprudence which was uncalled for; that case therefore has no application to the present. Here, assuming that the company had done their duty, the passenger did nothing more than that which came within the scope of his enjoyment while traveling, without committing any imprudence; in passing through a beautiful country he certainly is at liberty to stand up and look at the view, not in a negligent but in the ordinary manner of people traveling

(1) 1 Law Rep., 4 C. P., 739.

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for pleasure. Here the defendant was simply looking at the signal lights, and there was nothing in his conduct which can be imputed to him as negligence or imprudence.

BLACKBURN, J. I do not agree with the defendants' counsel as to the principle of a railway company's liability. I take it that a railway company are not bound to carry passengers safely and securely, at all events, but to take all reasonable care that in the management of their trains the passenger is not exposed to undue danger. Then was the plaintiff conducting himself in such a way as amounted to a want of ordinary care? As to that, I can only say it was a question for the jury, and they were right in the verdict that they have found. Looking out of the window, though not a necessary act on the part of the passenger, was not an improper act. In *Adams v. Lancashire and Yorkshire Railway Co.* ⁽¹⁾ the passenger voluntarily incurred a known and ascertained danger. That case is decided on a different principle, for here there was no known or ascertained danger. The essence of this case is that the plaintiff, trusting that the company had 167] *done their duty, stood up and looked out of the window, and, by reason of the door being unfastened, fell out and was injured.

MELLOR, J. I am of the same opinion. I think the case was rightly left to the jury. It seems to me quite clear that the door, by the negligent act of the defendants, was left unfastened; and I do not agree with the defendants' counsel that a passenger must sit still throughout the journey. I am satisfied, therefore, that the rule ought to be discharged. In *Adams v. Lancashire and Yorkshire Railway Co.* ⁽¹⁾ the leave reserved was on the ground that there was no evidence that the accident was caused by the negligence of the company, and the court held that it was the result of the imprudent conduct of the plaintiff.

QUAIN, J. I agree that the rule must be discharged. It appears to me that the question is whether the plaintiff knowingly did an act of a perilous nature voluntarily. If he did, the case is governed by *Adams v. Lancashire and Yorkshire Railway Co.* ⁽¹⁾, if not, the case is distinguishable. *Rule discharged.*

Feb. 23, 1873. *W. G. Harrison*, for the defendants on appeal. The question on the point reserved is whether there was evidence of liability of the defendants ⁽²⁾. First, they were guilty of no negligence; there is no evidence that the lock of the door was out of order; all that was proved was that on being pressed

⁽¹⁾ Law Rep., 4 C. P., 739.

⁽²⁾ The defendants appealed upon the whole of the rule, if the Court of Exchequer Chamber should think it open

to them, but the court at once intimated that the defendants could only appeal upon the point reserved.

by the plaintiff's body the door flew open. It may have been left open by the defendants' servants, or it may have been opened by a passenger and left improperly fastened between Westminster Station, whence the train started, and the Victoria Station, where the plaintiff got in. And there would be no means of examination by the defendants' servants between these stations, the door being on the off side away from the platform. But, secondly, assuming the mere fact of the door opening as stated to be *prima facie* evidence of negligence on the part of the defendants, this negligence was not the cause of the accident; *it was the plaintiff's own act which caused it: *Siner v. [168 Great Western Railway Co. (1)]*. The question, of what has been somewhat wrongly, perhaps, called contributory negligence, is involved in the question of the defendants' liability: *Adams v. Lancashire and Yorkshire Railway Co. (2)*. That case is directly in point; there, the door having flown open several times, the plaintiff fastened it, and on attempting to fasten it the fourth time he fell out, and the jury found for the plaintiff. The court overruled the view of Brett, J., at the trial and, with the concurrence of that learned judge, entered a nonsuit.

[BRETT, J. I have ever since repented for having given way in that case.

KEATING, J. I observe that the lord chief justice in the Court of Queen's Bench cites the judgment of my brother Brett and applies it to the decision of the present case; and the ground on which the decision in *Adams v. Lancashire and Yorkshire Railway Co. (2)* proceeded is explained in the Court of Queen's Bench. that the plaintiff incurred an obvious danger in order to remedy an inconvenience not amounting to a justification to him for incurring the danger.]

That is much stronger than the present case; here was no inconvenience whatever. Had the plaintiff sat still he never would have met with the accident.

[KELLY, C.B. It would seem that the Court of Common Pleas took upon themselves to say not only that there was evidence of want of proper care on the part of the plaintiff but conclusive evidence, on which the jury ought to have so found.]

That makes the case still stronger for the defendants in the present case. And it is fully borne out by the case of *Bridges v. North London Railway Co. (3)* in this court, in which the majority of the court held that the question of contributory negligence was open on the reservation of leave to enter a nonsuit if there was no evidence of negligence on the part of the de-

(1) Law Rep., 3 Ex., 150; Law Rep., 4 Ex., 117.

(2) Law Rep., 4 C. P., 739.

(3) Law Rep., 6 Q. B., 377.

fendants; negligence meaning negligence which caused the accident.

[KELLY, C.B. If there is evidence of negligence on the part of the defendants, and of contributory negligence on the part of 169] *the plaintiff, that must always be a question for the jury, and it is not a case for a nonsuit.]

Not if the evidence of the plaintiff's improper conduct comes out in the course of the evidence for the plaintiff. Channell, B., in *Bridges v. North London Railway Co* ⁽¹⁾, says: "It is not enough merely to show some negligence on the part of the defendants contemporaneous with the accident. In order to constitute a cause of action, the damage to the party complaining must be caused by the negligence of the defendants. Here the proximate cause of the damage was the act of the deceased in descending from the carriage when he did." So here the plaintiff's own conduct was the cause. Again: "I do not think that in all cases the question of contributory negligence must necessarily be left to the jury. It is true that in ordinary cases the plaintiff is not bound to negative contributory negligence, so that in such cases the defendant must prove the contributory negligence, if it exists; yet if facts are disclosed on the plaintiff's case, the truth of which is not disputed, and which, if true, clearly show the plaintiff contributed to the accident, then the judge may nonsuit, not because he can take upon himself to find the contributory negligence proved, but because, in such a case, the plaintiff fails upon an issue which lies upon him, viz., the issue whether the damage is caused by the negligence of the defendants." Bramwell, B., in substance says the same thing ⁽²⁾. Therefore the principle on which *Adams v. Lancashire and Yorkshire Railway Co* ⁽³⁾ was decided was upheld by this court in *Bridges v. North London Railway Co.* ⁽⁴⁾ It is submitted, therefore, that in this case the plaintiff brought the accident on himself by his improper conduct in unnecessarily pressing against the door without first ascertaining whether it was properly fastened; and there was consequently no evidence of the defendants' liability.

KELLY, C. B. I am of opinion that this judgment must be affirmed. The question for our consideration is, whether there is any evidence of the liability of the defendants, the rule being to enter a verdict for the defendants on the sole ground that 170] there *was no evidence of the liability of the defendants. Now what is the evidence? It appears that the plaintiff was a passenger by the defendants' train, and that, as he was passing from one station to another, with a view of looking out of the

⁽¹⁾ Law Rep., 6 Q. B., at pp. 392, 394.

⁽²⁾ Law Rep., 4 C. P., 789.

⁽³⁾ Law Rep., 6 Q. B., at p. 395.

⁽⁴⁾ Law Rep., 6 Q. B., 877.

window he rose from his seat and took hold of the bar of the window and pressed against it. The pressure, such as it was, of some part of his body, upon his taking hold of the bar, caused the door to open, and the motion of the train to throw him out of the carriage, whereby he sustained the injury complained of. These are all the facts, and the first question is, whether there was any evidence of negligence on the part of the defendants; and the second question which must necessarily arise from the terms of the reservation,—viz., that there was no evidence of liability, not merely of negligence, on the part of the defendants,—is whether there was any evidence to go to the jury that the mischief which befell the plaintiff was caused by the negligence of the defendants.

First, was there any evidence of negligence at all on the part of the defendants? I am of opinion that there was evidence for the jury to consider, whether the defendants' servants had not, when this train left the station from which it started on its journey, failed to see that the door was properly fastened in the ordinary manner in which such railway carriage doors are fastened. There was evidence to go to the jury that they had failed in the performance of that duty. But the preliminary question arises, is it their duty? I am of opinion that it is — that it is the duty of the railway company, by their servants, before the train starts upon its journey, to see that the door of every carriage is properly fastened. Here was evidence that this door was not properly fastened: for if it had been, it would not have flown open upon the degree of pressure that was applied to it by the plaintiff; and therefore there was evidence to go the jury, upon which they were justified in finding that there was negligence on the part of the defendants.

But then, I agree, we must go further, and inquire whether there was evidence of "liability:" in other words, whether there was evidence also that the negligence of the company was the cause of the mischief which occurred to the plaintiff. I am of opinion that there was evidence. Certainly the mischief would not have befallen him if that door had been properly fastened. The *question is, therefore, whether he did anything [17] which it was not lawful for him to do, and which we should be satisfied, taking the whole evidence together, was the cause of the mischief which befell him. If he did, I agree that the case fails on the part of the plaintiff. But why? Because, though he has proved that the defendants were guilty of negligence, he has not proved that the negligence was the cause of the mischief which befell him. The question of what has been termed contributory negligence does not, in my opinion, arise: first, because I am clearly of opinion upon the facts that there

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was no evidence of contributory negligence; but even if there were evidence of contributory negligence, the rule is not for a new trial on the ground that the learned judge did not leave that question to the jury or that it was a verdict against the weight of evidence: and there was no right to entertain any such question. And, therefore, upon this case, and on the facts that are before us, no question whatever of contributory negligence arises. The question is, whether there was evidence of negligence on the part of the company which caused the accident. I have already shown that there was evidence of negligence; and that there was evidence to go to the jury that their leaving the door not properly fastened was the cause of the injury which the plaintiff sustained without any improper act on the part of the plaintiff. Because I am of opinion that any passenger in a railway carriage, who rises for the purpose either of looking out of the window, or of dealing with, and touching, and bringing his body in contact with the door for any lawful purpose whatsoever, has a right to assume, and is justified in assuming, that the door is properly fastened; and if by reason of its not being properly fastened his lawful act causes the door to fly open, the accident is caused by the defendants' negligence.

I think, therefore, the Court of Queen's Bench were right in discharging the rule, and judgment must be affirmed.

MARTIN, B. I am also very clearly of opinion that the Court of Queen's Bench were right; but I cannot go to the length of the chief baron in this matter, for I think there was a question of contributory negligence which was properly left to the jury.

172] *A man was traveling on the underground railway, where there is little to see except walls, and there are attached to the windows, as any person who has traveled by it knows, bars, which clearly indicate it to be a dangerous thing to put one's head or hand out of the window. Therefore, it seems to me, that you cannot possibly shut out from the consideration of the jury whether or not a man may not do wrong, and know that he is doing wrong, in putting his head or hand out of the window. But in this particular case what occurred was this. The man was sitting in the carriage, he meant to look out of the window to see if certain lights were visible and to call the attention of his brother to them, but before he did anything of this sort, by merely putting his hand on the bar, the door flew open, and the man met with the accident. It might have occurred if he had intended merely to shift his seat to the other side of the carriage, if he had accidentally put his hand upon the bar. It seems, under these circumstances, impossible for me to take upon myself to say "I will nonsuit this plaintiff, as there was

no case to go to the jury." The truth is, I do not think the case was arguable.

KEATING, J. I also think that the judgment of the court below ought to be affirmed, because, taking the question as it seems to be now established it must be put to the jury, it appears to me that there was clearly evidence to go to the jury. I agree with Mr. Harrison that the question to be put to the jury is, whether the defendants have been guilty of negligence which caused the accident complained of by the plaintiff; and in looking at such a question, of course, it is extremely difficult to disengage it from the consideration of whether there was or was not contributory negligence upon the part of the plaintiff. But assuming, for the purpose of argument, that there may be such contributory negligence on the part of the plaintiff as would entitle the judge to nonsuit upon the ground that a verdict finding that there was no contributory negligence would be set aside as being perverse, assuming that for this purpose without deciding that it is so, it is clear in this case that the judge could not have taken upon himself to withhold the question from the jury, whether it be taken as a *simple question [173 of the negligence of the defendants, or whether it be taken to be, as I take it to be, the right question, whether there was negligence upon the part of the defendants such as caused the accident; because for the reasons already pointed out by the lord chief baron and my brother Martin, although it might have been a question for the jury whether there was or was not contributory negligence, without going the length of saying there was no evidence of that, yet it seems clear to me that there was evidence on the compound question, if I may so express myself. There was evidence that the negligence of the defendants caused the accident, without such negligence upon the part of the plaintiff as would have freed the defendants from liability in that respect.

The case, which has been so much relied on, of *Adams v. Lancashire and Yorkshire Ry. Co.* (¹), has been much commented upon. In that case a door having flown open three times, and each time the plaintiff having succeeded in shutting it without any accident, upon the fourth occasion when it flew open (which it did from a defective construction of the lock, and therefore clearly from negligence upon the part of the railway company), in trying to shut it he fell out of the carriage, and was injured. Now my brother Brett, before whom the case was tried, was of opinion that there was clearly a case to go to the jury upon the part of the plaintiff, and left it to the jury, giving leave to move; and the jury having found for the plaintiff, the Court of Com-

(¹) Law Rep., 4 C. P., 739.

mon Pleas certainly did enter a nonsuit upon the ground that there was no evidence to go to the jury. With reference to the principle upon which that case proceeded, I agree with the principle laid down by my brother Brett. He says, "It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person in incurring danger in an attempt to get rid of it. I confess I am not prepared to go to that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury [74] that might result from an attempt to avoid *such inconvenience" ('). I approve of that rule entirely. Sitting in a court of error, I may be permitted to say what I would not venture to say if I were sitting in a court below, that I think the right application of that rule to the facts of that case was that which was applied at the trial by my brother Brett, and not when the case was before the court in banc; but in the principle upon which that case was decided, I for one entirely concur; and I think here, if Mr. Harrison could have shown that what was done by the plaintiff was obviously dangerous — manifestly dangerous — that the plaintiff would not have been justified in incurring an obvious manifest danger for the purpose of getting rid of no inconvenience at all: because in this case there was no inconvenience whatever. But it appears to me that the plaintiff had a right to assume that the company were not negligent, and that all the doors were properly shut; and having a right to assume that, he had a right to get up and do what he did, to put his hand upon the bar; and in doing that the door flew open, and the accident occurred. That being so, it appears to me this case is entirely denuded of any of the difficulty that surrounded the cases which were referred to by Mr. Harrison. Of course, each of these cases must be judged by its own particular facts, and looking to the facts of this case, I do not entertain the least doubt that the judgment of the court below was right.

BRETT, J. I agree that in these cases the plaintiff is bound to give evidence to satisfy the jury that the injury of which he complains was caused by the negligence of the defendants, or some person for whom the defendants were answerable, and that that negligence of the defendants was the cause of the plaintiff's injury; and further, that it was the sole cause, in a certain sense. This does not mean that the defendants' negligence was the only cause, because, supposing it were attempted to be shown that some person other than the defendants (not the plaintiff) had also contributed by negligence to the accident,

(') Law Rep., 4 C. P., at p. 748.

and so both being in falt at the time, the fault of each having not exactly an equal share, but having a share in what took place, neither can recover, because both were clearly in fault. But all that Mr. Harrison has made out in this case, as far as I can judge, is not that both parties were in fault, but that the act of the plaintiff contributed to the accident, but not his negligence and default. It is impossible, as it appears to me, to say that in getting up, and touching and pressing against the door as he did, there was anything in the nature of negligence at all. That part of the case of the defendants, it appears to me, therefore fails altogether.

Then the question is whether there is such evidence of negligence in the defendants in this case that a jury might reasonably find a case of liability on the part of the defendants. I apprehend there can be no doubt now that this is the way the case must be regarded after the considered judgment of the whole Court of Exchequer Chamber in the case of *Ryder v. Wombwell*.⁽¹⁾ It is there said: "It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as is stated by Maule, J., in *Jewell v. Parr* ⁽²⁾, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey v. London and Brighton Ry. Co.* ⁽³⁾ Williams, J., enunciates *the same idea thus: 'It [178 it not enough to say that there was some evidence . . . A scintilla of evidence . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence.' " This is, of course, upon a rule to enter a verdict, which is a matter of consent between the parties, in order to prevent the necessity of a new trial which would be the result of a bill of exceptions. When it comes before the court in that way, they are to look at the whole case and see whether there is such evidence as might reasonably satisfy a jury of the liability charged. Now, as to whether in a case of this description you may or may not look at the contributory negligence of the plaintiff, I will not enter upon that question, except for the purpose of saying that you could not do so in all cases. Whether you might do so in a case in which it is the act of the plaintiff that causes the damage he sustains — his own act, as for instance, jumping out of a carriage, which was the case in *Bridges v. North London Ry.*

⁽¹⁾ Law Rep., 4 Ex. at p. 39.

⁽²⁾ 3 C. B. (N. S.), 146, at p. 150; 27 L.

⁽³⁾ 13 C. B., 909, at p. 916; 22 L. J. (C. J. (C. P.)), 39. P.), 253.

that it would be unreasonable for a jury to find that it was not negligence. I therefore think that, the plaintiff not being shut out from affirming that he himself had not been guilty of any negligence, there was a point that was properly left to the jury; and that the jury were justified in saying that he had not been guilty of negligence, that is to say, had not been guilty of not using ordinary care in his mode of traveling. I therefore think that there was evidence in this case from which the jury might fairly find for the plaintiff; and no case which would justify the judge in withdrawing the evidence from the jury. It is said that this case is governed by the case of *Adams v. Lancashire and Yorkshire Ry. Co.* ⁽¹⁾ I think not. The ground upon which that judgment was based was certainly that the plaintiff there did do something so obviously dangerous, and so obviously without necessity, that the court were entitled to deal with the matter, and I think the case put by Mr. Harrison might possibly come within the same rule when it arises. He says: If a door were open at the starting of the train, and the passenger were not to attempt to shut the door, but at once to jump out of the door, either on the platform or after the train had passed the platform, it then might fairly be said, if a jury were to find that that was not negligence on the part of the plaintiff, that such a finding was unreasonable, and therefore the judge or the court might deal with such a case. But, however that might be, there was no such obvious danger in this case, no such evidence as would entitle the court to act upon the rule laid down in *Adams v. Lancashire and Yorkshire Ry. Co.* ⁽¹⁾. Whether that decision was correct in applying the rule which it laid down to the evidence before the court, I confess at this moment I very much doubt. I was a party to that judgment, as I have stated, but I think it is obvious, from the form of all the judgments in that case, that I was a reluctant party at the time to that judgment: but the authority of the other judges was so great [77] *that I could not resist it; and I think, if that case were to come into a court of error, I should be prepared now to say that, although the rule laid down was right, yet its application to the circumstances was wrong.

CLEASBY, B. In the present case I think it clear that no question of contributory negligence arises at all. Such a question arises when both parties are substantially in fault, and when the fault of each contributes to the disaster. The rule was established before railways were made, and an illustration of it would be, one man driving furiously in the crowded streets of London at fifteen miles an hour, and a man driving on his wrong side not quite so furiously, perhaps, but still obviously in fault;

(¹) Law Rep. 4 C. P., 739.

and so both being in falt at the time, the fault of each having not exactly an equal share, but having a share in what took place, neither can recover, because both were clearly in fault. But all that Mr. Harrison has made out in this case, as far as I can judge, is not that both parties were in fault, but that the act of the plaintiff contributed to the accident, but not his negligence and default. It is impossible, as it appears to me, to say that in getting up, and touching and pressing against the door as he did, there was anything in the nature of negligence at all. That part of the case of the defendants, it appears to me, therefore fails altogether.

Then the question is whether there is such evidence of negligence in the defendants in this case that a jury might reasonably find a case of liability on the part of the defendants. I apprehend there can be no doubt now that this is the way the case must be regarded after the considered judgment of the whole Court of Exchequer Chamber in the case of *Ryder v. Wombwell*.⁽¹⁾ It is there said: "It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject of course to review) is, as is stated by Maule, J., in *Jewell v. Parr* ⁽²⁾, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established. In *Toomey v. London and Brighton Ry. Co.* ⁽³⁾ Williams, J., enunciates *the same idea thus: 'It [178 it not enough to say that there was some evidence . . . A scintilla of evidence . . . clearly would not justify the judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude that there was negligence.' " This is, of course, upon a rule to enter a verdict, which is a matter of consent between the parties, in order to prevent the necessity of a new trial which would be the result of a bill of exceptions. When it comes before the court in that way, they are to look at the whole case and see whether there is such evidence as might reasonably satisfy a jury of the liability charged. Now, as to whether in a case of this description you may or may not look at the contributory negligence of the plaintiff, I will not enter upon that question, except for the purpose of saying that you could not do so in all cases. Whether you might do so in a case in which it is the act of the plaintiff that causes the damage he sustains—his own act, as for instance, jumping out of a carriage, which was the case in *Bridges v. North London Ry.*

⁽¹⁾ Law Rep., 4 Ex. at p. 39.

⁽²⁾ 3 C. B. (N. S.), 146, at p. 150; 27 L.

⁽³⁾ 13 C. B., 909, at p. 916; 22 L. J. (C. J. (C. P.)), 39.

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Co. ⁽¹⁾; where it is not so much a contributory act as the act itself that causes the injury, which he says was consequent upon the negligence of the defendants — whether in such a case as that you may look at the conduct of the plaintiff I will not now say. It was the opinion of some of the court in the case of *Bridges v. North London Rg. Co.* ⁽²⁾ that you might do it in such a case as that. But it is not necessary for the decision of the present case to decide that, because, as I have said, in my opinion, there was no negligent act of the plaintiff whatever.

We have only, therefore, one question to deal with, whether there is reasonable evidence of a want of due and reasonable care in the defendants. Now, it cannot be said that there was any warranty on the part of the defendants that this door should be sufficiently and carefully fastened, and therefore it cannot be put that simply because the door was not fastened and flew open there was liability. I think there must be some evidence of a want of due and reasonable care. But then you find that upon a slight pressure the door opens. In considering what evidence is sufficient to call for an answer, I think that you [179] must look at the means *which the plaintiff has of proving more. The plaintiff could not show, at all events he could not be expected to show, that there was no fastening to the door, or that the fastening had got defective and therefore could not be relied upon, or that with a good fastening the door had been carelessly put to by the porter; but what he proves is this: he shows that a state of things takes place which probably arose from some negligent act of the defendants, and he calls upon them for an answer. The state of the fastening of the door is not shown. If they had shown that the door was perfectly right in every respect, that the fastening was not defective, and it had appeared that in shutting in succession a great number of doors with the despatch which is necessary there had been some haste and defect so as to put a case of almost inevitable accident, then the question would have arisen perhaps whether there was not some evidence to be left to the jury; but certainly that would be a case in which the proper conclusion of the jury would be, in my opinion, that it was not the sort of negligence that involves responsibility. But that would be a question for the jury still; and in any way, I think, the plaintiff having proved all he could be expected to prove, that the door was so defectively fastened as to fly open when he had a right to expect that it would be fastened, it is quite sufficient to call on the defendants to show that that arose from circumstances which did not amount to negligence.

⁽¹⁾ Law Rep., 6 Q. B., 377.

⁽²⁾ See the judgment of Cleasby, B., Law Rep., 6 Q. B. at p. 384

GROVE, J. I am of the same opinion. I think there is some evidence of negligence here to go to the jury. I suppose the court must assume ordinary facts, otherwise a door would have no meaning at all in the ears of the court, and one must assume (at all events the jury must have evidence of that) that it was the ordinary case of a railway door that shuts from the outside, and can only be conveniently shut by a person from the outside. It is jammed to with some force in order to enable the catch to bite and hold the door firm, and it would be extremely inconvenient if it had to be shut by the passengers inside. That being the case, the ordinary duty of the railway servants when a train leaves the station would be to shut and firmly fasten the catch of the door, and they are deviating from their ordinary practice, and, I think, *their ordinary duty, if they omit [180 so to shut the door — the doors being so constructed, and properly so; because if you arranged a door so that the passenger could open it from the inside, it would be an extremely perilous system. It must open with a comparatively light catch; passengers would be continually opening the door, and it would be very much worse for the general safety of the public. Then if that be the duty of the company's servants, there was some breach of duty; or there might be evidence for the jury to consider whether there was some breach of duty if the door was left open. Then it was said there was no evidence here that the company's servants left it open. It might have been opened by some one else, of which we have no evidence. But in almost every question that can come before a jury, probabilities must be looked at. Absolute mathematical proof of each circumstance in all human transactions cannot be gone into. Were, then, the jury entitled to look here at the probabilities of the case, assuming the door to be such as I have described — an ordinary door, to be shut, and shut with some degree of force, from the outside? The plaintiff was called as a witness. He could have been cross-examined. Probably the jury assumed, no question having been asked him, that he had not tampered with the door, or his brother who was in the carriage with him. Was there not, therefore, a *prima facie* probability that there had been negligence on the part of the servants of the company, and that they had left the door open? And if so, that could have been rebutted by the defendants calling the servants to give evidence that they had shut all the doors in the ordinary way, and as to the state of the door when the train left the previous station. It seems to me that there was a fair and *prima facie* probability to leave to the jury, and that there was some negligence in the servants not performing their ordi-

nary and usual practice of shutting the doors at the time when the train left the previous station.

Secondly, upon the question of contributory negligence, I refrain from giving any opinion at present whether there might be cases in which a court of error, or a court looking merely at the law of the question, as a court would upon a bill of exceptions, could enter upon a question of contributory negligence. 181] *And here I may say, on looking into the case of *Bridges v. North London Ry. Co.* ⁽¹⁾, which has been very much relied upon, that the head-note appears to be erroneous in stating that it was held by a majority of the Court of Exchequer Chamber, viz. Bramwell, Channel, Pigott and Cleasby, B.B., that upon the reservation of leave to enter a verdict for the plaintiff, if there was any evidence of negligence on the part of the defendants proper for the jury, the question of whether there was evidence of contributory negligence on the part of the plaintiff was open. Now, I find upon referring to the case, that in the judgment of Pigott, B. he gives no opinion at all on the question of contributory negligence; but he says: "The conclusion at which I have arrived is that, whether Mr. Bridges brought this misfortune upon himself by contributory negligence in descending from the carriage at an improper place, or whether he sustained his injury from some accidental circumstance of falling on the rails after he had reached the ground, there is no negligence on the part of the railway company's servants, to which it is shown to have been due by any reasonable evidence; and therefore the judgment of the Queen's Bench ought to be affirmed." ⁽²⁾. It would appear, therefore, that, in that case, three of the judges were of opinion that a question of contributory negligence might be entertained by the court, and three that it could not; and therefore we are not bound at present, that being the strongest case on the subject, by the decision of the Exchequer Chamber, as to whether the question of contributory negligence, which must be a question of fact, is not open, assuming that there was some negligence on the part of the defendants, or whether the court could entertain it. That no doubt is a matter of some importance, a matter as to which the profession, I believe, entertain a considerable doubt.

There is another observation to be made upon that case; that as the majority of the court were of opinion that there was no negligence on the part of the defendants, it was not absolutely necessary that they should enter into the question of contributory negligence; and the expression of their opinion was to a certain extent *obiter*. In the present case I do not think it can be 182] *contended that the court could adopt the view that

⁽¹⁾ Law Rep., 6 Q. B., 877.

⁽²⁾ Law Rep., 6 Q. B., at p. 888.

the evidence of contributory negligence was of such a demonstrative character, that the court could say that the verdict must necessarily pass, and absolutely ought to have passed, for the defendants on that ground; and therefore we need not in this particular case consider the question of contributory negligence. Whether any such question could or can arise, I am not sure that the test of a perverse verdict is quite a sufficient test, because that would certainly introduce, to my mind, a very considerable change in the law, if a court, acting as a court of law, could assume it simply as a question of law, because a verdict the other way would be a perverse verdict. I am not sure whether that doctrine, if applied to some cases, might not lead to some novel results. At all events, I do not think that question arises in any way here. And *Bridges v. North London Ry. Co.* ⁽¹⁾ does not decide that it is a question of law which the court can entertain.

Judgment affirmed.

Attorney for plaintiff: *T. H. Dixon.*

Attorneys for defendants: *Burchells.*

[Law Reports, 8 Queen's Bench, 186.]

Feb. 17, 1873.

***GILL v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE [186
RAILWAY COMPANY.**

Railway Company—Carriers of Cattle—Negligence—Conditions as to Restiveness of Cattle—Principal and agent—Agreement for interchange of Traffic.

The plaintiff desired to send a cow from D. to S., and took her to the station at D., belonging to the G. N. Co., where he booked her for S. by the defendants' railway. He signed a contract, under which it was agreed between him and the G. N. Co. that they should not be responsible for any loss or injury to cattle, in the delivering, if such damage should be occasioned by kicking, plunging, or restiveness. The cow was put into a truck belonging to the defendants, and on arriving at S. was brought to a siding by the defendants' yard for the purpose of being unloaded. A porter in charge of the yard began to unfasten the truck. The plaintiff thereupon warned him not to let the cow out, as she would run at him; nevertheless he did let her out; she ran about the yard, and ultimately got on to the line and was killed. By an agreement between the defendants and the G. N. Co. it was provided that a complete and full system of interchange of traffic in passengers, goods, parcels, &c., should be established from all parts of one company and beyond its limits to all parts of the other company and beyond its limits, with through tickets, through rates, and invoices and interchange of stock at junctions; the stock of the two companies being treated as one stock. . . . That the two companies should aid and assist each other in every possible way, as if the whole concerns of both companies were amalgamated. In an action brought against the defendants for the loss of the cow, the court having power to draw inferences:

(1) Law Rep., 6 Q. B., 377.

fendants; negligence meaning negligence which caused the accident.

[KELLY, C.B. If there is evidence of negligence on the part of the defendants, and of contributory negligence on the part of 169] *the plaintiff, that must always be a question for the jury, and it is not a case for a nonsuit.]

Not if the evidence of the plaintiff's improper conduct comes out in the course of the evidence for the plaintiff. Channell, B., in *Bridges v. North London Railway Co* ⁽¹⁾, says: "It is not enough merely to show some negligence on the part of the defendants contemporaneous with the accident. In order to constitute a cause of action, the damage to the party complaining must be caused by the negligence of the defendants. Here the proximate cause of the damage was the act of the deceased in descending from the carriage when he did." So here the plaintiff's own conduct was the cause. Again: "I do not think that in all cases the question of contributory negligence must necessarily be left to the jury. It is true that in ordinary cases the plaintiff is not bound to negative contributory negligence, so that in such cases the defendant must prove the contributory negligence, if it exists; yet if facts are disclosed on the plaintiff's case, the truth of which is not disputed, and which, if true, clearly show the plaintiff contributed to the accident, then the judge may nonsuit, not because he can take upon himself to find the contributory negligence proved, but because, in such a case, the plaintiff fails upon an issue which lies upon him, viz., the issue whether the damage is caused by the negligence of the defendants." Bramwell, B., in substance says the same thing ⁽²⁾. Therefore the principle on which *Adams v. Lancashire and Yorkshire Railway Co* ⁽³⁾ was decided was upheld by this court in *Bridges v. North London Railway Co*. ⁽⁴⁾ It is submitted, therefore, that in this case the plaintiff brought the accident on himself by his improper conduct in unnecessarily pressing against the door without first ascertaining whether it was properly fastened; and there was consequently no evidence of the defendants' liability.

KELLY, C. B. I am of opinion that this judgment must be affirmed. The question for our consideration is, whether there is any evidence of the liability of the defendants, the rule being to enter a verdict for the defendants on the sole ground that 170] there *was no evidence of the liability of the defendants. Now what is the evidence? It appears that the plaintiff was a passenger by the defendants' train, and that, as he was passing from one station to another, with a view of looking out of the

⁽¹⁾ Law Rep., 6 Q. B., at pp. 392, 394.

⁽²⁾ Law Rep., 6 Q. B., at p. 395.

⁽³⁾ Law Rep., 4 C. P., 739.

⁽⁴⁾ Law Rep., 6 Q. B., 377.

window he rose from his seat and took hold of the bar of the window and pressed against it. The pressure, such as it was, of some part of his body, upon his taking hold of the bar, caused the door to open, and the motion of the train to throw him out of the carriage, whereby he sustained the injury complained of. These are all the facts, and the first question is, whether there was any evidence of negligence on the part of the defendants; and the second question which must necessarily arise from the terms of the reservation,—viz., that there was no evidence of liability, not merely of negligence, on the part of the defendants,—is whether there was any evidence to go to the jury that the mischief which befell the plaintiff was caused by the negligence of the defendants.

First, was there any evidence of negligence at all on the part of the defendants? I am of opinion that there was evidence for the jury to consider, whether the defendants' servants had not, when this train left the station from which it started on its journey, failed to see that the door was properly fastened in the ordinary manner in which such railway carriage doors are fastened. There was evidence to go to the jury that they had failed in the performance of that duty. But the preliminary question arises, is it their duty? I am of opinion that it is—that it is the duty of the railway company, by their servants, before the train starts upon its journey, to see that the door of every carriage is properly fastened. Here was evidence that this door was not properly fastened: for if it had been, it would not have flown open upon the degree of pressure that was applied to it by the plaintiff; and therefore there was evidence to go the jury, upon which they were justified in finding that there was negligence on the part of the defendants.

But then, I agree, we must go further, and inquire whether there was evidence of "liability:" in other words, whether there was evidence also that the negligence of the company was the cause of the mischief which occurred to the plaintiff. I am of opinion that there was evidence. Certainly the mischief would not have befallen him if that door had been properly fastened. The question is, therefore, whether he did anything [17] which it was not lawful for him to do, and which we should be satisfied, taking the whole evidence together, was the cause of the mischief which befell him. If he did, I agree that the case fails on the part of the plaintiff. But why? Because, though he has proved that the defendants were guilty of negligence, he has not proved that the negligence was the cause of the mischief which befell him. The question of what has been termed contributory negligence does not, in my opinion, arise: first, because I am clearly of opinion upon the facts that there

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from Doncaster to Sheffield, and accordingly took her to the Great Northern Railway Station at Doncaster, and there booked the cow for Sheffield by the Manchester, Sheffield, and Lincolnshire Railway, and signed a contract, under which it was agreed between the undersigned and the Great Northern Railway Company, that the animal named on the other side was to be conveyed only upon the conditions mentioned upon the ticket received by the undersigned from the company, and it was not to be insured. One of the conditions referred to, and upon which the question in this case turns, was as follows: "The Great Northern Railway Company give further notice, that they convey horses, cattle, sheep, pigs, and other live stock, in wagons, subject to the following conditions—1st, that they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or restiveness of the animal." The other conditions are not material.

The plaintiff's cow was put in a truck belonging to the Manchester, Sheffield, and Lincolnshire Railway Company, and the plaintiff and his man traveled by the same train, and they and the cow arrived at the station at Sheffield about twenty minutes to seven o'clock; the plaintiff and his man then got out and walked down to the place where the cattle arriving by train are unladen. They waited until the trucks were shunted to the usual place for the purpose of being unladen, being a sort of yard or landing-place inclosed with a post and rail fence on one side and at one end, and by an inclosed pig-pen at the other end, with an incline leading into it. It was separated from the line of railway by posts and chains. A servant of the defendants' company was in charge of this yard or loading-place, and as soon as the trucks in which the cattle had been carried had been shunted to the side of the yard, he called out "Who belongs to the Sheffield cow?" The plaintiff immediately said, "I do." The porter in charge said, "Have you signed?" Plaintiff said "No." Whereupon he directed the plaintiff to go to the office and sign. The plaintiff accordingly did so, saying to the porter, "Don't let her out until I get back." After the plaintiff had signed the book at the office, he came [190] back, just as the *porter was unfastening the truck. The plaintiff thereupon said, "Don't let that cow out; if you do, she'll go slap at you." The porter turned and laughed, and said, "She'll be right when she gets out." The porter said, "Close the gate." Whereupon plaintiff said, "I shall go outside," and did so. The porter stood inside, and drew the bolt of the truck, and the cow rushed out. She ran about the yard.

The chains were down, and the porter and plaintiff's man struck at her to turn her back; she ran up the incline into the pig-pen, and then down and up again, and jumped over the rails of the pig-pen on to the line and so into the tunnel, and was killed. This was all the evidence as to the circumstances attending the injury to the cow.

The plaintiff, for the purpose of establishing his right to sue the defendants, called for and put in evidence an agreement between the Manchester, Sheffield, and Lincolnshire Railway Company and the Great Northern Railway Company, dated the 17th of June, 1857, of which the material clauses were the following:

"That a complete and full system of interchange of traffic in passengers, goods, cattle; parcels, &c., &c., be established from all parts of one company, and beyond its limits, to all parts of the other company, and beyond its limits, with 'through tickets,' 'through rates,' and invoices, and interchange of stock at junctions, the stock of the two companies being treated as one stock, mileage and demurrage not being charged between the two companies, the repairs of the rolling stock of each company being done by the company owning it.

"That the two companies do aid and assist each other in every possible way, as if the whole concerns of both companies were amalgamated; and that every possible facility be given by either party to develop and increase the traffic of both.

"That a joint committee of three directors of each of the two companies shall have the charge of the working out of this agreement, with power to call in a chairman unconnected with the traffic of either company (say, a barrister of good practice, or other public man of good standing) summarily to settle any dispute that may arise.

"That, in dividing the through traffic, the following miles shall be given to the Manchester, Sheffield, and Lincolnshire Company *from the total actual aggregate mileage be- [191
tween Manchester and places west of Manchester, and London and places south of London, 20 miles; between Manchester and Sheffield, inclusive of both, and London and places south of London, 18 miles; between Sheffield and London, ditto, ditto, 10 miles; between Hull and London, 10 miles; between Grimsby and London, ditto, ditto, 20 miles. All other traffic to be divided on actual mileage. A model settlement to be prepared by the accountants. All traffic to be divided after the deduction of government passenger duty, and the usual clearing house terminals on goods and parcels traffic."

This was the plaintiff's case; and it was thereupon contended on the part of the defendants, that the contract for the carriage

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of the cow was with the Great Northern Railway Company, and not with the defendants; and, further, that the loss of the cow was caused by the cow being restive and unfit to be carried by railway.

My brother Cleasby, being of opinion that the loss of the cow was wholly attributable to the character of the cow, and that if the defendants did not completely perform their contract, it was because the cow could not be delivered, directed the plaintiff to be nonsuited, leaving the other question open to the defendants, and reserving leave to the plaintiff to move to enter a verdict for him for 15*l.* if any contract was established between him and the defendants, and if the case was not within the exception in the contract as to restiveness; the court to draw inferences from the facts.

At the conclusion of the argument we declared our opinion, that the action was rightly brought against the defendants, inasmuch as, if the provisions of the agreement of the 17th of June, 1857, did not constitute an actual partnership between the respective companies as to all the matters embraced by it, still they came within the rule expressed by Lord Cranworth in *Cox v. Hickman* ⁽¹⁾: "The real ground of liability is, that the trade has been carried on by persons acting on his [the defendants'] behalf;" and per Lord Wensleydale to the same effect in the same case ⁽²⁾. In our opinion, the Great Northern Railway Company became, by virtue of their agreement with the defendants, the agents of the latter, to make the contract for the [192] carriage of the cow with the plaintiff. *We reserved for further consideration the question as to the effect of the exception as to restiveness contained in the contract.

It was contended for the plaintiff, that although the effect of the reservation was to relieve the defendants from liability for any injury to the cow arising from the restiveness of the animal during the receiving, forwarding, or delivering the same, yet it did not relieve them from liability for negligence on the part of the defendants' servants in the delivery of the cow; and we are all agreed that such is the true effect of the contract.

But it was further contended, that we ought to draw the inference that there was negligence on the part of the defendants' servants in the delivery of the cow under the circumstances above stated: and with regard to this contention on the part of the plaintiff a difference of opinion amongst the members of the court arises. It was suggested, in the first place, that the porter in charge of the landing place was too hasty in unfastening the door of the truck, after he had been warned by the owner that if he did so, the cow would run slap at him; secondly,

⁽¹⁾ 8 H. L. C., at p. 306.

⁽²⁾ 8 H. L. C., at p. 315.

that he ought to have waited until other animals had been unloaded from the trucks, which might have had the effect of calming the restiveness and excitement of the cow; and, thirdly, that the chains of the posts dividing the landing yard from the line of rails were some of them down.

Now, I am of opinion that there is nothing in any of these suggestions, or in the facts as they appear on the judge's notes, which ought to induce us to draw the inference of negligence on the part of the company's servants, which frees the case from the effect of the reservation as to restiveness contained in the contract of carriage. I think that the effect of that reservation was to relieve the defendants from all liability arising from the restiveness of the cow. I cannot doubt that the *causa causans* of the injury was the restiveness of the cow. The contention of the plaintiff, if it could be successful, would extend instead of diminish the liability of the defendants in the carriage and delivery of such animals, as it would require the company not merely to provide an ordinary and reasonable place of delivery, and to use ordinary and reasonable care adapted to animals in their normal condition, but the limit of the precautions to be *adopted by the defendants would necessarily be required [193 to be commensurate with the excitement and restiveness of the cattle to be delivered. It cannot, I think, be doubted that if the cow in the present case had not been restive within the meaning of the reservation in the contract, the place of delivery, and the course adopted by the company's servants, would have insured the safe delivery of the cow. The place of delivery was the usual, and, under ordinary circumstances, a suitable place for delivery.

It is not pretended that the porter in charge was in any sense an improper or incompetent person to superintend the delivery of cattle, and most probably he had had great experience. Was there then any duty on his part to delay the delivery of the cow, because at the moment he was unfastening the door of the truck, the owner of the cow said to him, "Don't let that cow out; if you do, she'll go slap at you"? If the porter in charge was to govern the discharge of his duty by such an intimation of personal danger so conveyed, the business of the company would be greatly impeded. That the cow in question was not the only beast to be delivered is manifest, not only from the evidence, but from the suggestion made by the plaintiff's counsel that the porter ought to have delayed the delivery of that cow until other cattle had been unladen. How long was the delay to last? Was it to be co-extensive with the restiveness of the animal? Was the business of the company to suffer indefinite

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delay and inconvenience because the plaintiff had chosen to send a cow in an unfit condition?

According to the contention on the part of the plaintiff, the reservation in the contract, instead of relieving the company and restricting their liability, would positively extend it, and instead of expressing that the company would not be liable for injury arising from the restiveness of such animals, would be construed to mean that "restive cows will be treated with unusual care." Surely it cannot be contended that the delay was to be co-extensive with the excitement of the cow, or that other servants were to be drawn from other duties to assist in the delivery, or that other cattle should be unloaded out of turn for the purpose of quieting this restive cow. Only one other suggestion of negligence was made, *viz., that the chains were down; the answer to that is, that the death of the cow was in no respect due to that fact.

In conclusion, I express my opinion, that the porter was not bound to alter the usual and ordinary course of delivery by reason of what was said by the plaintiff as to the probability of his incurring personal danger, but that it was his duty to exercise his own judgment as to any danger resulting from letting out the cow, and if he did so honestly, it cannot be imputed as negligence to the company. I further think that the true effect of the company's contract was to take ordinary and usual and reasonable means of delivering cattle sufficient and reasonable for cattle in their normal condition, but that they were not, under the contract in question, obliged to depart from such ordinary, usual, and reasonable means, because the cow in question was restive, excited, and unfit to be delivered.

I agree, therefore, with the opinion of my brother Cleasby, expressed at the trial, and I think that the loss of the cow was wholly attributable to her character and conditions, and not to negligence on the part of the company; and, therefore, that the rule to enter the verdict for the plaintiff ought to be discharged.

LUSH, J. We intimated in the course of the argument our opinion, that the action, if sustainable at all, might be brought either against the present defendants or against the Great Northern Company. The reasons for our so holding have been stated by my brother Mellor in his judgment, and in those reasons I concur.

The case was not submitted to the jury, but leave was reserved to the court to enter a verdict for the plaintiff, if the court should be of opinion that the case was not within the exception of restiveness, and if any liability on the part of the defendants was established. We are therefore placed in the position of a jury and bound to draw our own conclusions, and say whether they ought to have found their verdict for the plaintiff or for the defendants.

It is upon the question, what is the proper conclusion to be drawn from the evidence, that the difference between us arises.

The facts lie in a very small compass. The plaintiff having bought a cow in the market, booked her at Doncaster, to be carried *by rail to Sheffield, where he resided, he and his [195 man traveling as passengers by the same train. The train arrived at Sheffield between six and seven in the evening of the same day, the 16th of November, and the cattle-trucks were drawn up to their proper place, by the side of the cattle-yard. The plaintiff, who had to go to the office and sign a receipt for the cow before he was permitted to take her away, told the porter not to let the cow out of the truck till he came back. On his return from the office he observed the porter was unfastening the truck. He called out to him, "Don't let the cow out; if you do, she'll go slap at you." The porter answered, "She'll be all right when she gets out; close the gate," and proceeded to unbolt the door. The plaintiff thereupon left the yard, saying, "If you do that, I shall go outside." The cow, being let out, began to run about the yard, and towards a spot where she might have got on to the line. Being driven back by some persons who were there, she ran up to a pig-pen at the other end of the yard, and leaped over the rails of the pen on to the line, where she was run over and killed by a passing train.

The fair inference from these facts is, I think, that the cow was, while in the truck, in so excited a state as to make it dangerous to let her out until preparations had been made for securing her and taking her away in safety, which is what I infer the plaintiff intended to do; and that the warning given to the porter, though it intimated only danger to himself as the consequence of liberating the cow at that moment, must or ought to have conveyed to his mind that other mischief might happen if the animal were then set at large.

It was contended for the defendants that there was no evidence of negligence, and that, at all events; the company were exonerated from liability by virtue of the conditions printed on the cattle-ticket, and by which, no doubt, the plaintiff was bound.

The condition relied on is in these terms:

"The company give notice that they convey horses, cattle, sheep, pigs, and other live-stock in wagons, subject to the following conditions:—1st. That they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal, in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or restiveness of the animal."

*It cannot, I think, be contended that this condition dis- [196 penses with the use of reasonable care on the part of the company in the receiving, carrying, and delivering cattle, any more

than the exception of perils of the sea, in a bill of lading, relieves a shipowner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can, by reasonable skill and care, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability; but if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him: see *Phillips v. Clark* (*).

The precise degree of care which it is the duty of a carrier to use, in delivering the goods entrusted to him, must depend upon and vary with the nature and condition of the thing carried, and the ever-varying circumstances under which the delivery takes place. Some goods require much more tender handling than others; some animals much more care and management than others, according to their nature, habits, and conditions; and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place, and had to deal with the goods or animals under the circumstances and subject to the conditions in which the carrier is placed, and under which he is called on to act.

If it had appeared in this case that the exigencies of business required the porter to discharge the cattle-trucks immediately, or that the plaintiff meant to put upon the company the charge of his cow, or to require the use of the truck for an unreasonable time, the case would have borne a different complexion; but I infer that all which the plaintiff wanted was, time to enable him either to sooth and quiet the cow, so that he might drive her home, or to secure her and so prevent her doing mischief, either to himself or to persons who might come in her way; and the porter could, without loss or inconvenience to the company or any other person, have kept the cow in the truck for that reasonable time. This, I think, he was therefore bound to do, and that as the mischief was attributable to his letting her at large, the company are liable. I am, *therefore, of opinion that the nonsuit was wrong, and that the verdict ought to be entered for the plaintiff for 15*l.*, the statutory value of the cow.

My brother Blackburn concurs in this judgment.

Rule absolute.

Attorneys for plaintiff: *Pitman & Lane, for Chambers & Sons, Sheffield.*

Attorneys for defendants: *Cunliffe & Beaumont, for Lingard & Co., Manchester.*

[Law Reports 8 Queen's Bench, 202.]

Jan. 24.

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Charterparty, — Contract — Illegality — Mens rea — The Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 78 — Order in Council prohibiting the Landing of Hay.

By a charterparty made by defendant's agent in France defendant chartered plaintiff's ship, and it was stipulated that the ship should load a cargo of pressed hay at T., in France, and proceed direct to London; and all cargo was to be brought and taken from ship alongside. Defendant's agent verbally told the master that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port the master was unable to land the hay at the wharf by reason of an order in council under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United Kingdom. The order had been made before the charterparty was entered into, but neither party knew of it. After some delay defendant received the hay from alongside the ship into another vessel, and exported it. There was no legal obstacle to doing this, but eighteen days were allowed by the defendants to elapse beyond the lay days. The plaintiff having brought an action for this detention of his ship, the defendant contended that the contract was for an illegal purpose, and therefore void:

Held, that, although it was the intention of the parties, when the charterparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void; and defendant was therefore liable for the demurrage.

DECLARATION on a charterparty, by which plaintiff's ship *Cas-tor* was chartered by one Jacques, for a voyage from Trouville to London, under which seventeen bales of pressed hay were shipped, according to terms of bills of lading, by which the hay was to be delivered at the port of London to order, which bills were *endorsed to defendant, claiming eighteen days de- [203 murrage at London beyond the lay days, at 50s. a day, as per charter.

Pleas, *inter alia*, 7: That Trouville is a place in the territory of the French Republic, and that the hay agreed, under the charterparty and bill of lading, to be loaded on board the plaintiff's vessel, was hay to be loaded at Trouville, and that by the charterparty and bill of lading, the plaintiff agreed to bring the hay so loaded at Trouville into a port of Great Britain, to wit, London, and to deliver the same there, in accordance with the usage and custom of the port, that is to say, to land the hay at a proper landing-place within the port of London, and to deliver the same when so landed there. That at the time of the making of the charterparty and bill of lading, during all the time that the ship with the hay on board was and was detained in the port of London, there was in force an order in council, made by Her Majesty's Privy Council, dated the 9th of March, 1871,

under the Contagious Diseases (Animals) Act, 1869, to wit : 1. " This order shall take effect from immediately after the 13th of March, 1871, and words in this order have the same meaning as in the act of 1869. 2. Cattle brought from any place in the territory of the French Republic, or from any place in Belgium, shall not be landed at any port or place in Great Britain . . . 4. The following articles, brought from any place as aforesaid, shall not be landed at any port or place in Great Britain . . . hay." And at the time of making the charterparty and bill of lading, and the loading the said hay, and bringing the same in the plaintiff's ship into the port of London for the purpose of landing the same within the port, according to the said custom and usage of the port, the plaintiff was a British subject, and was bound by the provisions of the act of parliament, and of the order in council.

Issue joined.

At the trial before Cockburn, C. J., at the sittings in London after Hilary Term, 1871, the plaintiff had a verdict for 45*l.*, the amount claimed, being for eighteen days demurrage at 50*s.* : with leave to move to enter a verdict for defendant, if the facts proved the plea of illegality.

A rule was afterwards obtained accordingly, on the ground that the contract sued on was illegal, and could not be enforced, 204] *being for and relating to an illegal purpose, and contrary to the statutes.

The facts are sufficiently stated in the judgment.

Nov. 18, 1872. *Butt*, Q. C., and *R. E. Webster* showed cause. The rule was obtained on the ground that the contract was illegal and void, *ab initio*, by reason of the order in council, made under 32 & 33 Vict. c. 70, s. 78 ⁽¹⁾; but that is not so: the order only prohibits the landing; there is nothing illegal in the contract; the charterparty is to London, but there is not one word about landing in it or in the bill of lading. It could, therefore, have been carried out legally at once, by taking the hay direct from the ship, and re-shipping, which was ultimately done. The contract was not necessarily illegal, and certainly not illegal to the knowledge of the parties. If it can be carried out legally, each party is bound by it: *Haines v. Busk* ⁽²⁾; *Lewis v. Davison* ⁽³⁾; *The Teutonia* ⁽⁴⁾. The customs license might have been obtained immediately; and even if this had taken time to procure, the defendant would be liable for the delay; *Hill v. Idle* ⁽⁵⁾.

Nov. 21. *Milward*, Q. C., and *MacLachlan*, in support of the

⁽¹⁾ See post, p. 206, n. (1).

⁽²⁾ 5 Taunt., 521.

⁽³⁾ 4 M. & W., 654, 657.

⁽⁴⁾ Law Rep., 4 P. C., 171, 181.

⁽⁵⁾ 4 Camp., 327.

rule. The question is what was the intention of the parties with regard to the hay when they entered into the charterparty. This intention may be gathered, not only from the contract in the charterparty, but may be supplied by parol evidence: *Coltins v. Blantern* ⁽¹⁾. When the parties entered into the charterparty it must have been their intention that it should be landed in the port of London. The charterparty only stipulates that the hay shall be carried to London; but there was a further parol contract with the master that it should be landed at the wharf at Deptford Creek. The master was, therefore, bound to take the ship to the place of discharge: *Brereton v. Chapman* ⁽²⁾; *The Felix* ⁽³⁾. The parol contract and charterparty show that the contract was illegal, because it was in contravention of the statute 32 & 33 Vict. c. 70, s. 78, *and the order in council [205 made thereunder. ⁽⁴⁾ To perform the contract and unload the ship would have been an illegal act: *Elliott v. Richardson* ⁽⁵⁾; *Forster v. Taylor* ⁽⁶⁾; and the license afterwards obtained to export the hay does not purge the original illegality: *Muller v. Gernon*. ⁽⁷⁾ It was clearly illegal to perform the contract as the parties intended it should be performed: *Cunard v. Hyde* ⁽⁸⁾; and as the vessel never was taken to the wharf at Deptford Creek, and the lay days did not commence until the vessel was at the place of discharge, the plaintiff cannot recover in the action.

Cur adv. vult.

Jan. 24. The judgment of the court (Cockburn, C.J., Blackburn and Mellor, JJ.) was delivered by

BLACKBURN, J. This is an action brought by the owner of a ship against the charterer for detaining the ship, in which the plaintiff has obtained a verdict, subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality.

On the trial before the lord chief justice the material facts appeared to be, that the charterparty was made in France on the 7th of October, 1871, between the agent of the defendant and the master of the ship.

By the charterparty it was stipulated that the ship, then at Trouville, a port in France, should there load a cargo of pressed hay and proceed therewith direct to London; and a term in the charterparty was to the effect that all cargo should be brought and taken from the ship alongside. ⁽⁹⁾

The defendant's agent verbally told the master that the con-

⁽¹⁾ 1 Sm. L. C., 263.

⁽²⁾ 7 Bing., 559.

⁽³⁾ Law Rep., 2 A. & E., 273.

⁽⁴⁾ See post, p. 206, n., (1).

⁽⁵⁾ Law Rep., 5 C. P., 744.

⁽⁶⁾ 5 B. & Ad., 887.

⁽⁷⁾ 3 Taunt., 394.

⁽⁸⁾ 2 E. & E., 1; 29 L. J. (Q.B.), 6.

⁽⁹⁾ Article IV. of the charterparty was: "*Le chargement sera prêt à livrer sous le palan.*"

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signees would require the hay to be delivered to them at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do.

On arriving in the Thames the master proposed to proceed to the wharf, but then for the first time learned that by an order 206] in *council, made under the authority of the Cattle Diseases Act (¹), France was declared to be an infected country, and it was made illegal to land in Great Britain any hay brought from that country. He could not therefore proceed to the wharf and there deliver the cargo, for that would have been landing the hay, and illegal. After some delay the defendant received the cargo from alongside the ship in the river into another vessel and exported it. There was no legal objection to this being done (²), but during the interval eighteen days beyond the lay days elapsed, and it was for this detention that the plaintiff recovered.

It appeared that the order in council had been made and published before the charterparty was entered into, but that in fact neither the master of the ship nor the defendant's agent was aware that it had been made.

A rule was obtained, which was argued in Michaelmas term before my lord chief justice, my brother Mellor, and myself, when the court took time to consider.

We are of opinion that the rule should be discharged. The charterparty provides that the cargo was to be taken from alongside; and that being so, the consignee might select any legal and reasonable place within the port at which to take it from alongside. He, by his agent in France, named this wharf, which he supposed, erroneously, to be a legal place, and the master under the same mistake, assented to this, as indeed he would 207] have had *no right to refuse, if it had really been a legal place. But when it turned out that the defendant had named a place for the performance of the contract where the perform-

(¹) By 32 and 33 Vict. c. 70, s. 78, the privy council may from time to time, by order, make such regulations as they think expedient for prohibiting or regulating the landing of any hay, straw, fodder, or other article brought from any place out of the United Kingdom, whereby it appears to the privy council contagion or infection may be conveyed to animals, or for causing the same to be destroyed, if landed. If any person lands, or attempts to land, any hay, straw, fodder, or other article in contravention of any such order, the same shall be forfeited in like manner as goods the importation whereof is prohibited by the acts relating to the cus-

oms are liable to be forfeited; and the person so offending shall be liable to such penalties as are imposed on persons importing or attempting to import goods the importation whereof is prohibited by the acts relating to the customs, without prejudice to any proceeding against him under this act or any such order, but so that no person be punished twice for the same offense.

The order in council of the 7th of March, 1871, was in the terms set out in the 7th plea.

(²) All that was necessary was an order from the customs for permission to transfer the hay for export to some other vessel named.

ance was impossible, because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable. See *The Teutonia* ⁽¹⁾, a case which would have been precisely in point, if the order in council rendering the landing illegal had come into operation after the contract was made instead of before.

It was on the fact that the order in council existed at the time the contract was made that the argument for the defendant was mainly grounded.

It was said that the intention of both parties was, that the hay was to be landed, that therefore they intended to violate the law, and that it may be shown by extraneous evidence that a contract, on the face of it perfectly legal, is void because made with intent to violate the law, and that ignorance of the law makes no difference. But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He no doubt contemplated and expected that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object; but all that the shipowner bargained for, and all that he can properly be said to have intended, was that, on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship. If, unexpectedly, there had arisen a great demand for hay abroad, like that which existed when our army was in the Crimea, the consignee might have transhipped the hay and exported it without the shipowner having the slightest ground for complaining that his intention was frustrated. We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks* ⁽²⁾, it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *McKinnell v. Robinson* ⁽³⁾, "for the express purpose of a violation of the law." But in the present case the shipowner never did even *contemplate or believe that [208 the defendant would violate the law. He contemplated that the defendant would land the goods which he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods.

We quite agree, that, where a contract is to do a thing which

⁽¹⁾ Law Rep., 4 P. C., 171.

⁽²⁾ Law Rep., 1 Ex., 213.

⁽³⁾ 3 M. & W., at p. 442.

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cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance.

No one could for a moment contend, that if everything which happened in France had happened within the jurisdiction of our country, the plaintiff and defendant's agent could have been successfully indicted for a conspiracy to violate the law by landing these goods: for there would have been a want of *mens rea*. And it seems to us that the *mens rea* is as necessary to avoid a contract, which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible.

Rule discharged.

Attorneys for plaintiff: *Ingledeu, Ince, & Greening.*

Attorneys for defendant: *Ashurst, Morris, & Co.*

[Law Reports 8 Queen's Bench, 244.]

Feb. 17, 1873.

244] * SWIFT V. WINTERBOTHAM, P. O., AND GODDARD.

False Representation — Signature of Party to be charged — 9 Geo. 4, c. 14, s. 6 — Signature by agent of Company formed under 7 Geo. 4, c. 46 — Principal and Agent — Action against Joint Tortfeasors.

The plaintiff sued W. & G. jointly, for a false representation with respect to the solvency of R. The defendant W., was sued as the public officer of a banking company, formed under 7 Geo. 4, c. 46, and the defendant, G., was the manager at one of their branches. The plaintiff was a customer of the S. bank, and requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to "the manager" of the defendants' banking company, requesting information whether R. was responsible to the extent of 50,000*l.* The defendant, G., wrote a letter, which he signed as manager, giving a favorable reply as to R.'s responsibility. The plaintiff, in consequence of this letter, supplied R. with goods, for which he never was paid in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. The defendants' banking company had no knowledge, otherwise than through G., that such a letter had been written, and gave him no express authority to write the letter, but the writing of such a letter was an act done within the scope of the general authority conferred on G. as manager:

Held, first, that the signature of G. as manager was the signature not merely of an agent, but of the defendants' banking company itself, and therefore the signature of the party to be charged within s. 6 of 9 Geo. 4, c. 14, s. 6, so as to make the banking company liable for his false representation.

Secondly, that the letters showed that the communications were between the two banks; and the representation was not merely the representation of G. personally, but of the defendants' banking company.

Thirdly, that inasmuch as it is usual for the customers of a bank to make inquiries like that made by the plaintiff, it must be taken to have been within the contemplation of the defendants that the inquiry as to R.'s solvency might have been made on behalf of a customer of the S. bank, and that the representation might be communicated to him; and that the banking company and G. were liable to the plaintiff, he being the customer who had made the inquiry.

Fourthly, that, on the authority of *Barwick v. English Joint Stock Bank* (Law Rep., 2 Ex. 259), the banking company was liable for the false representation of its manager, made in the course of conducting the business of the bank.

Lastly, that, as all persons directly concerned in the commission of a fraud are to be treated as principals, the banking company and G. might be sued jointly.

THIS was an action against the defendant Winterbotham, as registered public officer of the Gloucestershire Banking Company, and the defendant Goddard, for a false and fraudulent representation that Sir William Russell was in good and solvent circumstances.

The defendants pleaded separately not guilty.

*At the trial, before Cockburn, C.J., at the sittings in [245 London after Hilary Term, 1872, a verdict was found for the plaintiff for 2,937*l.*, leave being reserved to move to enter a verdict for the nonsuit.

A rule was afterwards obtained on behalf of the defendant Winterbotham on the ground that there was no writing signed by the bank; that the defendant Goddard was not the agent of the bank to sign; that the bank was not liable for a false representation by the defendant Goddard; that there was no representation by the bank to the plaintiff; and that there was no representation by the bank, or false statement by them; and also for a new trial, on the ground that the verdict was against the weight of evidence.

A rule was also obtained on behalf of the defendant Goddard on the ground that the verdict was against the weight of evidence, and on the ground of misdirection in the lord chief justice in not telling the jury that the defendant Goddard had not made himself liable, the representation of November 9th, 1869, not being signed by him in his personal capacity, and no misrepresentation being signed by him within Lord Tenterden's Act (¹), or why a verdict should not be entered for the defendant, Goddard, on the ground that the alleged misrepresentation was not made to the plaintiff, and that the Sheffield and Hallam-

(¹) 9 Geo. 4, c. 14, s. 6: "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealing of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon, [sic.] unless such representation or assurance be made in writing, signed by the party to be charged therewith."

shire Bank were not the agents of the plaintiff to make the inquiry contained in the letter of the 8th of November, 1869.

The facts of the case and the arguments sufficiently appear in the judgment of the court.

June 5, 1872. *Day*, Q.C., and *Edward Clarke*, showed cause against both rules.

June 6. *H. James*, Q.C., *Risdon Bennett*, and *Jeune*, in support of the rule obtained by Goddard.

246] *June 7. *Sir John Karlake*, Q.C., *Sir George Honyman*, Q.C., and *Anstie*, in support of the rule obtained by Winterbotham.

The following cases, in addition to those mentioned in the judgment, were cited: on the point that the action was founded on a representation which, under 9 Geo. 4, c. 14, s. 6, must be made in writing, and "signed by the party to be charged therewith:" *Scott v. Eastern Counties Ry. Co.* ⁽¹⁾; *Kingsford v. Great Western Ry. Co.* ⁽²⁾; *Jessel v. Bath* ⁽³⁾; *Richardson v. Younge* ⁽⁴⁾; on the point that the representation was not that of the banking company, but of Goddard personally, and that the plaintiff could not therefore sue the banking company: *Western Bank of Scotland v. Addie* ⁽⁵⁾; *National Exchange Company v. Drew* ⁽⁶⁾; *Ranger v. Great Western Ry. Co.* ⁽⁷⁾; *D'Arcy v. Tamar, Ku Hill, & Cullington Ry. Co.* ⁽⁸⁾; *Barry v. Croskey* ⁽⁹⁾; *Pilmore v. Hood* ⁽¹⁰⁾; *Pasley v. Freeman* ⁽¹¹⁾; *Blakemore v. Bristol & Exeter Ry. Co.* ⁽¹²⁾. *Cur. adv. vult.*

Feb. 17. The judgment of the court (Cockburn, C.J., and Quain, J.), was delivered by

QUAIN, J. This is an action brought by the plaintiff against the defendant Winterbotham as the public officer of the Gloucestershire Banking Company, and against the defendant Goddard, who was the manager for the company at the branch bank at Cheltenham, for a false representation.

The declaration charged the defendants with making a joint false representation with respect to the credit and solvency of one Sir W. Russell, whereby the plaintiff was induced to sell to Russell certain goods for which the plaintiff has not been paid in consequence of Russell's insolvency.

The defendants severed in their pleadings, and some grounds of defense were set up on the part of the bank which were not applicable to the other defendant.

⁽¹⁾ 12 M. & W., 33. ⁽⁵⁾ Law Rep., 2 Ex., 158.

⁽²⁾ 16 C. B. (N.S.), 761; 33 L. J. ⁽⁶⁾ 2 J. & H., 1.

(C.P.), 307. ⁽¹⁰⁾ 5 Bing. N. C., 97.

⁽³⁾ Law Rep., 2 Ex., 267.

⁽⁴⁾ Law Rep., 6 Ch., 478.

⁽⁷⁾ Law Rep., 1 H. L. Sc., 145.

⁽⁸⁾ 2 Macq., 103.

⁽⁹⁾ 5 H. L. C., 72.

⁽¹¹⁾ 3 T. R., 51; 2 Sm. L. C., 71, 6th edit.

⁽¹²⁾ 8 E. & B., 1085; 27 L. J (Q.B.), 167.

*The facts were these. The plaintiff, having been [247 asked by an agent of Sir W. Russell to sell some iron, of the value of between 2000*l.* and 3000*l.* to Russell, requested a reference as to his credit, and was referred to the Cheltenham Branch Bank of the Gloucestershire Banking Company.

The plaintiff being a customer of the Sheffield and Hallamshire Bank at Sheffield, requested the manager of that bank to make the inquiry for him, and in consequence of that request, the manager of the latter bank wrote to the manager of the Gloucestershire Banking Company at Cheltenham a letter dated the 8th of November, 1869, of which the following is a copy :

“ Sheffield and Hallamshire Bank,

“ Sheffield, Nov. 8, 1869.

“ Sir,— I shall be much obliged by the favor of your opinion, in confidence, of the respectability and standing of Sir W. Russell, Bart., M.P. for Norwich, and whether you consider him responsible to the extent of 50,000*l.*

“ I am yours faithfully,

“ H. J. Wells,

Sub-Manager

“ The manager Gloucestershire Banking Company Cheltenham.”

To that letter the defendant Goddard replied by a letter dated the 9th of November, 1869, which is as follows :

“ Gloucestershire Banking Company,

“ Cheltenham, 9th Nov., 1869.

“ The Sheffield and Hallamshire Bank, Sheffield.

“ Gentlemen,— I am in receipt of your favor of the 8th instant, and beg to say in reply, that Sir W. Russell, Bart., M.P. for Norwich, is the lord of the Manor of Charlton Kings, near this town, with a rent roll, I am told, of over 7000*l.* per annum, the receipt of which is in his own hands, and has large expectations; and I do not believe he would incur the liability you name unless he was certain to meet the engagement.

“ I am, gentlemen, yours faithfully,

“ J. B. Goddard,

“ Manager.”

*It was upon the representation contained in this letter [248 of the 9th of November, 1869, that the present action was founded.

At the trial, before the lord chief justice, at the sittings after Hilary Term, 1872, it was found by the jury that the repre-

sentation contained in this letter was false to the knowledge of the defendant Goddard.

The banking company had, however, no knowledge (otherwise than through its manager Goddard) that such a letter had been written, and gave him no express authority to write the letter.

The jury further found as a fact, on the question being left to them, that the writing of such a letter as that of the 9th of November, was an act done within the scope of the general authority conferred on Goddard as manager of the branch bank. On these findings the verdict was entered for the plaintiff against both defendants for 2937l.

Both defendants moved to set aside this verdict on the ground that it was against the weight of the evidence; but, after considering the oral evidence adduced at the trial, and reading all the correspondence which passed between Sir W. Russell and the defendants respectively, we are not disposed to disturb the verdict on any of the questions of fact left to the jury.

But several questions of law were raised on behalf of the defendants respectively, and were argued before us, which it now becomes necessary to dispose of.

It was first objected, on the part of the banking company, that the action being founded on a representation, which under 9 Geo. 4, c. 14, s. 6, must be made in writing and signed "by the party to be charged therewith," the signature of Goddard, who it was contended was at best only an agent of the company, would not suffice to charge the company.

For this contention the case of *Hyde v. Johnson* ⁽¹⁾ was chiefly relied on. That was a case decided on the 1st section of the same act, which enacts that no promise or acknowledgment shall suffice to take a debt out of the statute of limitations unless it is contained in some writing "signed by the party chargeable thereby;" and it was held, that under that enactment the signature of an agent would not suffice, although in [249] that case the agent was *duly authorized to sign the acknowledgment, and it appeared that the defendant could not write. In the judgment of the court the chief justice refers to the various sections of 9 Geo. 4, and also to the sections of the statute of frauds as as in *pari materid.* The conclusion at which the court arrives is, that whenever the legislature intended that the party to be charged should be bound by the signature of his agent, there was an express enactment to that effect, and that in other cases the signature must be the signature of the actual party to be charged. This case was confirmed by the same court in *Clark v. Alexander* ⁽²⁾, and in another case, that

(1) 3 Scott, 289; 3 Bling. N. C., 776.

(2) 8 Scott's N. R., 147.

of *Toms v. Cuming* ⁽¹⁾. In the latter case, an act of parliament requiring that "every notice of objection shall be signed by the person objecting," the law as laid down in *Hyde v. Johnson* ⁽²⁾ was again acted on; and it was held that the signature by the agent of the "person objecting" was not sufficient. Since these cases were decided the legislature has enacted by the 13th section of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), that the signature of a duly authorized agent shall be sufficient under the 1st section of 9 Geo. 4, c. 14; but the law as expounded in *Hyde v. Johnson* ⁽²⁾ still remains applicable to the 6th section of the act.

We consider ourselves bound by these decisions to hold—there being no substantial difference between the language as to the signature, used in s. 1 and in s. 6—that, in an ordinary case of principal and agent, a written representation within s. 6 of 9 Geo. 4, c. 14, signed by the agent alone would not be binding on the principal, although such signature was duly authorized by him.

But it is contended, on the part of the plaintiff, that this law is not applicable to the present case, on the ground that the banking company "the party to be charged" can sign in no other way than by its agent or manager, and therefore that either the signature of Goddard is in fact and law the signature of the banking company within the 6th section of 9 Geo. 4, c. 14, or that where the principal is a body that cannot sign in any other way than by agent, the signature of the agent—the only signature possible in the circumstances—is sufficient.

*In order to decide the question it becomes necessary to [250] investigate the constitution of the banking company. It appears that the Gloucestershire Banking Company is a copartnership formed under 7 Geo. 4, c. 46, for the purpose of carrying on the business of bankers at places more than sixty-five miles from London. The company is not a corporation, and has, therefore, no common seal. It is a copartnership created by deed or articles of copartnership for a particular purpose, with certain statutable privileges. It can sue and be sued only in the name of one of its public officers, and in all litigious business the company is represented by one of its public officers who must be a member of the company; and individual members cannot be sued in respect of transactions with the company till a judgment or decree has been first obtained against the company through one of its public officers. In *Powles v. Page* ⁽³⁾ a company established under this act was considered a quasi corporate

⁽¹⁾ 8 Scott's N. R., 910; 7 M. & G., 88.

⁽²⁾ 3 C. B., 16.

⁽³⁾ 3 Scott, 289; 7 Bing. N. C., 776.

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body so as not to be affected by what may have been known to any individual member.

The act contains no provision as to the manner in which the company shall make or sign deeds, contracts, or documents of any description. It confers no authority on the public officer to bind the company, but makes him the representative of the bank only for litigious purposes; and although he must be a member of the company, he may have nothing to do with the management of its affairs. It seems obvious, therefore, from the nature of its constitution as a fluctuating and numerous body, that the company cannot affix its signature to documents otherwise than by the hand of some individual or individuals who, by the articles of copartnership, are appointed to represent the general body in such matters.

Now in the present case the deed of copartnership has not been produced, and all that we have to inform or guide us as to the mode in which the company signs a contract or written representation like the present letter is the finding of the jury, founded on the evidence as to the practice of joint-stock banking companies given on the trial, that it was within the authority of Goddard as manager of a joint-stock banking company to answer inquiries made by another joint-stock company respecting the responsibility of a particular person, and consequently that for the present purpose the signature of Goddard to the letter of the 9th of November must be taken to have been that of the company itself; and as the deed of copartnership was not produced, we may fairly infer that if produced it would have confirmed the finding of the jury. No other mode of signing by the bank has been proved before us.

Under these circumstances, we are of opinion that the signature of Goddard in this case, signing, as he does, as manager for the banking company, is in fact the signature, not merely of an agent, but of the banking company itself, and, therefore, the signature of the "party to be charged" within the 6th section of 9 Geo. 4, c. 14. We may add that this question cannot now arise with respect to banking copartnerships or other joint-stock companies formed under the Joint Stock Companies Act, 1862, so far at least as the signing of contracts is concerned, for the 37th section of 30 & 31 Vict. c. 131 enacts that "any contract which, if made between private parties, would be by law required to be in writing and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company."

It was further objected on behalf of the banking company that the representation was not the representation of the bank,

but of Goddard personally. We think there is no foundation for this objection. The inquiry was made by the Sheffield Bank and is signed by its sub-manager, and is addressed to the manager of the Gloucestershire Banking Company, and the reply is signed by Goddard, as manager of that bank. We think it clear, therefore, that the communications were in fact, and were intended to be, communications between the banks.

The next point relied on on behalf of both defendants was that the representation on which the action is founded was made not to the plaintiff, but to the Sheffield and Hallamshire Bank, and that the plaintiff, therefore, cannot sue upon it; that the plaintiff at all events never authorized any inquiry as to whether Sir W. Russell was responsible to the extent of 50,000*l*.

We think that the facts as proved, and as they must be considered to have been found by the jury, dispose of this objection.

The plaintiff was a customer of the Sheffield Bank, and it was *clearly established by the evidence that it was he who [252 put the Sheffield Bank in motion to make the inquiry, and that the inquiry was in fact made on his behalf and for his benefit. It is true that he was proposing to trust Sir W. Russell only to the extent of between 2000*l*. and 3000*l*.; and that it would have been sufficient for his purpose if the bank had inquired in respect of the responsibility of Sir W. Russell to that extent. But the plaintiff did not prescribe to his bankers how or in what manner they were to make the inquiry. He did not say to them "inquire if Sir W. Russell is responsible to the extent of 2000*l*. or 3000*l*," but he went to his bankers in the usual manner, and asked them to inquire generally as to the responsibility and standing of Sir W. Russell; and they made the inquiry in the form of the letter of November 8th, asking if he was responsible to the extent of 50,000*l*. On these facts we think that the inquiry was made on behalf of the plaintiff, and that it is of no consequence that the Sheffield Bank, without any express order from the plaintiff, put the inquiry in the form of asking if Sir W. Russell was a responsible person for 50,000*l*. Nor are the defendants at all prejudiced by the form of the inquiry; for, of course, if Sir W. Russell was represented to be a responsible person, for 50,000*l*., the plaintiff was entitled to infer that his credit must be good to the extent of 2000*l*. or 3000*l*. It was further proved in evidence that the usual way for customers of a bank to make inquiries of this description is through the bank, bankers uniformly refusing to answer inquiries made by private persons, strangers to the bank from which the information is sought, and only answering those made by other bankers; while it is notorious amongst bankers that such inquiries are constantly made on behalf of customers. We think, therefore, that

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it must be intended that the answers to such inquiries would be sent not merely for the use or benefit of the bank making the inquiry, but for the use and benefit of the customer on whose behalf the inquiry is made, and we think it must be taken in this case that the jury have so found.

These facts we think bring the present case within the law as laid down in *Langridge v. Levy* ⁽¹⁾, as it must be considered that it was within the contemplation of the defendants when the representation was made that it would or might be communicated to *the customer of the bank on whose behalf the information was sought; where that is so, and the person to whom the false representation is thus communicated acts on it and suffers damage thereby, he is entitled to maintain an action for such damage in the same manner as if the representation had been made directly to himself.

It is now well established that in order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff as one of the public acts on it and suffers damage thereby. We think that the law on this subject is correctly stated by Pollock, C.B. in *Bedford v. Bagshaw* ⁽²⁾ as follows: "Generally a false and fraudulent statement must be made with a view to deceive the party who makes the complaint, or at all events to deceive the class to whom he may be supposed to belong, although he may not be individually and particularly intended. There must always be evidence that the person charged with the false statement and the fraudulent conduct had in his contemplation the individual making the complaint, or at all events that the individual making the complaint must have been one of those whom he ought to have been aware he was injuring or might injure by what he was doing."

In the present case it has been proved to be the usage amongst bankers to make inquiries of this kind on behalf of their customers, and we think, therefore, that when Goddard wrote the letter of the 9th of November, he must necessarily be considered to have known and contemplated that it would or might be communicated to the customer of the Sheffield Bank (if any) on whose behalf the information was sought; and we are, therefore, of opinion that under these circumstances the customer (though not individually known to Goddard)—the representation having been communicated to and acted upon

(1) 2 M. & W., 519.

(2) 29 L. J. (Ex.), at p. 65.

by him, and he having been injured thereby — may sue upon it.

*It must, however, be understood that our judgment is [254 confined to the case before us, namely, the case of the customer at whose request the inquiry was actually made, and that it is not intended to apply to any other customer to whom the bank may have subsequently communicated the contents of the letter.

For these reasons we think that the plaintiff is entitled to maintain an action on this representation.

Lastly, it is contended on behalf of the defendants, that the signature of Goddard to the letter of the 9th of November is not sufficient to enable the plaintiff to bring an action against both defendants, as on a joint false representation, on the ground that if it binds Goddard personally, then it does not bind the bank jointly with him; or that if it binds the bank, then Goddard is not liable jointly with the bank. It was further objected on the part of the bank that the company as a principal was not liable for the fraud of its agent Goddard, unless it authorized the commission of the fraud, or ratified it.

As to this last point, assuming the case to be one in which a principal is sought to be made liable for the fraud of his agent, we consider that the case of *Barwick v. The English Joint Stock Bank* ⁽¹⁾ is conclusive to show that the banking company is liable for the fraudulent representation of its manager made in the course of conducting the business of the company.

As regards the objection that the defendants cannot be sued together as for a joint representation, it must be remembered that this is an action of tort, and in such actions all persons liable for the commission of the tort, whether principals, agents, or servants, are liable to be sued jointly. In *Cullen v. Thompson's Trustees and Others* ⁽²⁾, Lord Westbury says, "All persons directly concerned in the commission of a fraud are to be treated as principals, no party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another." Besides, in the present case, we hold that the letter of the 9th of November is signed by the bank as well as by Goddard personally, and that as the verdict establishes that the representation was false to the knowledge of Goddard, his knowledge is imputable to the bank: and therefore both are liable to be sued jointly.

*For these reasons we are of opinion that both rules [255 must be discharged, and that the plaintiff is entitled to our judgment.

Rules discharged.

Attorneys for plaintiff: *Harper & Co.*

Attorneys for defendants: *Waterhouse & Winterbotham.*

(1) Law Rep., 2 Ex., 259.

(2) 4 Macq., 424.

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[Law Reports, 8 Queen's Bench, 255.]

Feb. 1, 1873.

[IN THE EXCHEQUER CHAMBER.]

DAWKINS v. LORD ROKEBY.*

Libel and Slander—Privileged Communication—Proceedings of Court of Inquiry instituted by Commander-in-Chief under Articles of War—Evidence.

A court of inquiry, instituted by the commander-in-chief of the army under the Articles of War to inquire into a complaint made by an officer in the army, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted and recognized in the Articles of War and the Mutiny Acts; and statements, whether oral or written, made by an officer summoned to attend before such court to give evidence, are absolutely privileged, even though they be made *malâ fide*, and with actual malice, and without reasonable and probable cause.

Such statements are part of the minutes of the proceedings of the court, which, when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and on grounds of public policy cannot be produced in evidence.

BILL of exceptions to the ruling of Blackburn, J., in an action for libel tried in the Court of Queen's Bench at Westminster, on the 4th of February, 1871.

The declaration contained two counts. The first for writing and publishing of the plaintiff as follows: "On every occasion that I have seen him in the presence of his commanding officers his manner has betrayed a total want of deference, not to use a stronger term, and all reports have represented him as habitually insubordinate;" and also, "I certainly told him that unless he gained more self-command and behaved with more respect to those under whose orders he served, I must consider him unfit for command, as I did for his present position. I am still of that opinion, and I cannot think that I overstepped my duty in expressing it clearly to him;" and also, "he (the adjutant-general) 256] then asked *whether I wished the lieutenant-colonel (the plaintiff) to be tried for insubordination. I answered, I had only placed him under arrest because I could not permit an officer to treat me with marked disrespect in the presence of a great many junior officers, but that I scarcely believed him to be responsible for his actions. I should prefer his being admonished and released, and also I told the former court that which I again repeat, viz., that, after a long and earnest consideration of all that has passed, I reported to his Royal Highness my conviction that the lieutenant-colonel was unfit to command."

The second count was for speaking and publishing of the plaintiff words nearly identical with those contained in the first count.

*See *Dawkins v. Lord Paulet* L.R., 5 Q.B., 94.

Plea, not guilty, and issue thereon.

At the trial to prove the above issue, it was stated to the jury by counsel for the plaintiff, and admitted by counsel for the defendant, as follows:

1. That at the time of the writing and publishing of the words set forth in the first and second counts respectively, that is to say, of the 14th of February, 1865, the plaintiff was an officer in Her Majesty's army holding the commission of captain and lieutenant-colonel in the first battalion of the Coldstream regiment of foot guards, and the defendant was an officer in the army holding the commission of lieutenant-general.

2. That on the 25th of May, 1860, the defendant had been and was an officer in the army holding Her Majesty's commission as lieutenant-general, and in command of a brigade of the army including the regiment of foot guards, and the defendant continued to be the commanding officer of such brigade up to and until the 2d of July, 1860.

3. That plaintiff on the 25th of May, and up to and until the 2d of July inclusive, held Her Majesty's commission of captain and lieutenant-colonel in the regiment of foot guards, and was, during all that period of time, under the command of and subject to the orders of the defendant as his commanding officer.

4. That during that time certain regulations and orders made by Her Majesty relating to the discipline and government of the army, and known as "The Queen's Regulations and Orders for the Army," were and still are in force, among others a regulation as follows: "A court of inquiry may be assembled by [257 any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view such court may be directed to investigate and report upon any matters that may be brought before it, but it has no power (except when convened to record the illegal absence of soldiers as provided for in the Articles of War) to administer an oath nor to compel the attendance of witnesses not military." And a further regulation as follows: "A court of inquiry is not to be considered in any light as a judicial body. It may be employed at the discretion of the convening officer to collect and record information only, or it may be required to give an opinion also on any proposed question or as to the origin or cause of certain existing facts or circumstances; specific instructions on these points are, however, always to be given to the court. The proceedings are to be recorded in writing as far as practicable in the form prescribed for courts-martial, signed by each member, and forwarded to the convening authority by the president."

5. That on the 3d of February, 1865, it was directed by Field

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Marshal His Royal Highness George, Duke of Cambridge, commander-in-chief, that a court of inquiry should be held for the purpose of making such inquiries and affording such information as hereinafter mentioned and referred to.

6. That a letter summoning such court of inquiry was, on the 4th of February, 1865, by command of the commander-in-chief, sent by the adjutant-general to Lord F. Paulet, the fit and proper person to be charged with the duty set forth in the letter. The letter required Lord F. Paulet to cause certain officers therein named to be detailed as members of a court of inquiry under the presidency of Sir Alexander Woodford.

7. That, on the 4th of February, 1865, a letter, by command of the commander-in-chief, was sent by the adjutant general to Sir Alexander Woodford, informing him he was appointed president of a court of inquiry, and continued: "The subject which will be submitted for your investigation arises out of an assertion, frequently repeated and insisted on, by Lieut. Colonel Dawkins, that certain officers under whose command at various times he has been placed have made false statements of facts to 258] his injury. *Repudiating the interpretation which the commander-in-chief was willing to place on these words, viz., 'that Lieut. Colonel Dawkins alluded to opinions and conclusions on the part of those officers with which, being unfavorable to himself, he did not coincide,' this officer has insisted on giving the more offensive interpretation to his words, as will be seen by the correspondence submitted to the court. Under these circumstances it has become necessary, in justice to the officers who, in exercise of their command, have from time to time found fault with Lieut. Colonel Dawkins, to ascertain whether Lieut. Colonel Dawkins can substantiate his charges against them. The court, therefore, under your direction, will give, after due investigation, their opinion as to the validity of the charges in the sense in which Lieut. Colonel Dawkins presses them against his superior officers, and also will give their opinion upon Lieut. Colonel Dawkins' conduct generally, as evinced by the correspondence submitted, and state how far they consider the service will be benefitted, or the contrary, by placing Lieut. Colonel Dawkins in command of a battalion of Guards when the occasion presents itself."

8. That the court of inquiry met on the 10th of February, 1865, and proceeded to investigate the several matters submitted to them on that and several subsequent days.

9. That the plaintiff, as such officer, appeared before such court at such sittings, and made statements and produced and read documents in reference to the charges and to the matters so referred and submitted to the court of inquiry.

10. That the defendant as such officer was required to, and on the 14th day of February, 1865, did appear before the court of inquiry to be examined before the court touching the matters so referred and submitted to the court, and was examined by the plaintiff and by the court respectively touching the matters so referred and submitted.

11. That on the 14th of February the defendant, amongst other statements made by him in the course of his examination before the court, made to the court the several statements set forth in the second count of the declaration. And afterwards, and after the close of his examination before the court, and without any request by the court, or by the plaintiff, or by any other person to him so *to do, handed in to the said court a written paper [259 containing the words set forth in the first count, which was received by the court.

12. That the plaintiff applied to the proper military authority in that behalf for a court-martial on the defendant for such his conduct towards the plaintiff; and such military authority having power to grant or refuse the court-martial, did refuse to summon or allow the same to be held, whereupon the plaintiff brought the present action.

13. The aforesaid statements and admissions having been made upon the trial of this cause, thereupon the counsel for the plaintiff proposed and offered further to give in evidence and prove that the defendant, in making and handing in the said statements, set forth in the first and second counts respectively, was acting *malâ fide* and with actual malice, and that the statements were respectively made without any reasonable or probable cause for the same, and with a knowledge on the part of the defendant that they were respectively false.

14. Whereupon the counsel for the defendant interposed, and insisted that even if the evidence proposed and offered to be given by the plaintiff were given, and it was proved that the defendant in making the statements was acting *malâ fide* and with actual malice, and that the said statements respectively were made without any reasonable or probable cause and with a knowledge on the part of the defendant that they were respectively false, still the action would not lie.

15. And the judge declared his opinion that the evidence so offered to be given by the plaintiff was immaterial and irrelevant; and that, as a matter of law, the action would not lie, if the verbal and written statements were made by the defendant, being a military man, in the course of a military inquiry in relation to the conduct of the plaintiff being a military man, and with reference to the subject of that inquiry, even though the plaintiff should prove that the defendant had acted *malâ fide*

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and with actual malice, and without any reasonable and probable cause, and with a knowledge that the statements so made and handed in by him were false; and the judge then directed the jury, that under the circumstances so stated and admitted as 260] above set forth, *as a matter of law the action would not lie, even though the plaintiff should prove that the defendant had acted *malâ fide*, and with actual malice, and without any reasonable or probable cause, and with a knowledge that the statements so made and handed in by him were false. And the jurors, by the direction of the judge, then gave their verdict for the defendant upon the issue.

Feb. 13, 1872. *H. Matthews*, Q.C. (*Holl*, with 'him), for the plaintiff, contended, that *primâ facie* an action lies for libel or slander unless it be privileged; in the present case, there being malice, the statements were not privileged. The cases show that an action will lie for acts done in excess of authority by one military man to another: *Grant v. Shard* ⁽¹⁾; *Frye v. Ogle* ⁽²⁾; *Moore v. Bastard* ⁽³⁾; *Reynolds v. Kennedy* ⁽⁴⁾; *Wall v. M'-Namara* ⁽⁵⁾; *Swinton v. Molloy* ⁽⁶⁾; *Warden v. Bailey* ⁽⁷⁾. The modern doctrine that such an action does not lie is founded on *Johnstone v. Sutton* ⁽⁸⁾; but the reasoning of Lord Mansfield in that case is dissented from by Cockburn, C.J., in *Dawkins v. Lord F. Paulet* ⁽⁹⁾. *Home v. Bentinck* ⁽¹⁰⁾ only decided that a report of a court of inquiry is a state paper — that decision therefore does not apply. In *Dickson v. Lord Wilton* ⁽¹¹⁾ and in *Dickson v. Lord Combermere* ⁽¹²⁾, the question of malice was left to the jury. In *Dawkins v. Lord Rokeby* ⁽¹³⁾ there was no evidence that the defendant acted maliciously, and the opinion of Willes, J., though entitled to weight, was unnecessary. Upon the principle of those cases an action lies for defamatory statements if the defendant acted *malâ fide* and with actual malice. No action will lie against a witness for uttering defamatory statements in the course of a judicial proceeding, even though he do so maliciously: *Revis v. 261*] * *Smith* ⁽¹⁴⁾; *Floyd v. Barker* ⁽¹⁵⁾; *Dampart v. Simpson* ⁽¹⁶⁾; nor against a barrister, *Hodgson v. Scarlett* ⁽¹⁷⁾. But a court of

(1) Cited in the arguments in *Warden v. Bailey*, 4 Taunt., at p. 85.

(2) Cited by Lawrence, J., in *Warden v. Bailey*, 4 Taunt., at p. 87.

(3) Cited by Mansfield, C.J., in *Warden v. Bailey*, 4 Taunt., at p. 70, and reported in 2 Macarthur on Courts-Martial, 4th ed., 195.

(4) 1 Wills, 282.

(5) Cited in *Johnstone v. Sutton*, 1 T. R. at p. 536.

(6) Cited in *Johnstone v. Sutton*, 1 T. R., at p. 537.

(7) 4 Taunt., 67; in error, 4 M. & S. 400.

(8) 1 T. R., 510; 1 Brown, P. C., 76.

(9) Law Rep., 5 Q. B., at p. 108.

(10) 2 B. & B., 180.

(11) 1 F. & F., 419.

(12) 3 F. & F., 527.

(13) 4 F. & F., 806.

(14) 18 C. B., 126; 25 L. J. (C.P.), 195.

(15) 12 Co. Rep., 23.

(16) Cro. Eliz., 580.

(17) 1 B. & Ald., 232.

inquiry is not a judicial proceeding; it is not to be considered in any light as a judicial body, it may be employed at the discretion of the convening officer to collect information or to give an opinion: Simmonds on Courts-martial, chap 9. It is like a committee of a club inquiring into the misconduct of a servant, or the Benchers of the Inns of Court into the professional conduct of one of its members. In order to ascertain whether a court of inquiry is a judicial body, it is necessary to examine its constitution and the functions it has to discharge; it has none of the incidents of a judicial body; it has no power to administer an oath, and no indictment for perjury can be preferred against a witness; witnesses therefore who attend before it to give evidence are not absolutely privileged, but only privileged *sub modo*, that is, that their statements are not privileged if they are false to the knowledge of the persons making them. Even if the oral statements of a witness before a court of inquiry are privileged, the privilege does not extend to a written statement handed in by a witness where such statement is false to his knowledge, and made maliciously and without reasonable and probable cause.

Feb. 14, 1872. *Sir J. B. Karlake, Q.C.* (*Archibald and Fitzmaurice* with him), for the defendant, contended that the statements of a witness, who is a military man, and is required to attend before a court of inquiry, directed to be held by the commander-in-chief, into the conduct of another military man, are absolutely privileged, even though such statements are made maliciously and without reasonable and probable cause. And although a court of inquiry is not a court of record, yet, as the witness was not a volunteer, but was compelled to attend and give evidence, the statements made by him were protected on the ground of public policy, and no action would lie against him. If oral statements were privileged, then a written statement handed in during the course of the inquiry was equally privileged, as there was no valid distinction between them. He cited *Fray v. Blackburn* ⁽¹⁾; *Scott v. Stansfield* ⁽²⁾; *Revis* [262 v. *Smith* ⁽³⁾]; *Henderson v. Broomhead* ⁽⁴⁾; *Dawkins v. Lord F. Paulet* ⁽⁵⁾.

Matthews, Q.C., was heard in reply.

Cur. adv. vult.

Feb. 1. The judgment of the Court (*Kelly, C.B., Martin, Bramwell, Channell, Pigott, and Cleasby, B.B., Byles, Keating, Brett, and Grove, J.J.*), was delivered by

KELLY, C.B. The plaintiff in this case, a colonel in the army, having been reported to have exhibited on several occasions a

⁽¹⁾ 3 B. & S., 576.

⁽²⁾ Law Rep., 3 Ex., 220.

⁽³⁾ 18 C. B., 136; 25 L. J. (C.P.), 195.

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⁽⁴⁾ 4 H. & N., 569; 28 L. J. (Ex.), 360.

⁽⁵⁾ Law Rep., 5 Q. B., 94.

want of deference to some of his superior officers, and to have been guilty of other unofficerlike conduct, and also to have made certain charges against several of his brother officers; His Royal Highness the commander-in-chief was pleased to direct that a court of inquiry should be assembled, and that the matters should be inquired into and reported upon to him. A court of inquiry was held, and the defendant Lord Rokeby, also an officer of rank in the army, was required to attend, and did accordingly attend, as a witness before this court. Being examined as a witness, he gave certain *vivâ voce* evidence; and, when the examination was closed, handed in to the court a written paper, containing in substance a repetition of the evidence which he had given by word of mouth, with some additions upon the same subject; and this paper was received by the court, and it must be presumed formed part of the minutes of the proceedings. A report was duly made to the commander-in-chief, and certain consequences followed, but which do not appear in evidence on this record. It is, however, stated that the plaintiff applied to the proper military authority for a court-martial on the defendant, and that such military authority, having power to grant or to refuse the said court-martial, did refuse to summon or allow the same to be held. Thereupon the plaintiff brought the present action, in which, in the first count, he charges the written paper above referred to as a libel; and, in the second count, the *vivâ voce* evidence as verbal slander.

The above facts appear to have been admitted at the trial; and 263] *the counsel for the plaintiff further offered to prove that the defendant, in delivering in the written statement and giving the *vivâ voce* evidence, acted *malâ fide* and with actual malice, and that these statements were made without any reasonable or probable cause, and with a knowledge on the part of the defendant that they were false. I need scarcely observe that neither the charge of malice and willful falsehood, alleged on the part of the plaintiff to be capable of proof against the defendant, nor any charge of misconduct of any kind reflecting upon the plaintiff is to be taken to be true: such charges having been merely assumed to be provable for the purposes of argument, and in order to raise the questions to be determined in this cause. Upon these admissions and allegations the defendant's counsel insisted that the action was not maintainable, and the learned judge who tried the cause declared his opinion that the evidence so offered on the part of the plaintiff was immaterial and irrelevant, and that as matter of law the action would not lie, if the verbal and written statements complained of were made by the defendant, being a military officer in the course of a military inquiry, in relation to the conduct of the plaintiff,

he being also a military officer, and with reference to the subject of that inquiry; and this even though the plaintiff should prove that the defendant had acted *malâ fide* and with actual malice, and without any reasonable and probable cause, and with the knowledge that the statements made and handed in by him as aforesaid were false. Thereupon, the counsel for the plaintiff excepted to the said ruling of the learned judge, and this court is now called upon to decide whether such exception shall be allowed.

We are all of opinion that the ruling of the learned judge at the trial was right, and that the exception must be disallowed.

The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law.

The principle which pervades and governs the numberless decisions to that effect is established by the case of *Floyd v. Barker* ⁽¹⁾, and many earlier authorities from 27 Edw. 3, pl. 15, *9 Hen. 4, 60, pl. 9, and 9 Edw. 4, 3, pl. 10, down to the [264 time of Lord Coke; and which are to be found collected in *Yates v. Lansing* ⁽²⁾ and in *Revis v. Smith* ⁽³⁾. These two decisions, *Yates v. Lansing* ⁽²⁾ and *Revis v. Smith* ⁽³⁾, are themselves direct authorities that no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice. Lord Mansfield, in *Reg. v. Skinner* ⁽⁴⁾, observes: "Neither party, witness, counsel, jury, nor judge can be put to answer, civilly or criminally, for words spoken in office." Again, *Asitley v. Young* ⁽⁵⁾ is an authority directly in point, that no action lies upon a false affidavit sworn in a proceeding before justices of the peace or upon a calumnious statement made in answer to such an affidavit, Lord Mansfield, there observing: "Show that a matter given as evidence in a court of justice may be prosecuted in a civil action as a libel. The court indeed, before which such evidence is given, may censure it." And further on: "And as to the reason of the thing, there can be no scandal if the allegation is material, and if it is not, the court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record if it be upon the record." It has been argued, however, that if the matter deposed to be false to the knowledge of the deponent, an action may be maintained;

⁽¹⁾ 12 Co. Rep., 23.

⁽²⁾ 5 Joh., 282; 9 Joh., 395.

⁽³⁾ 18 C.B., 126; 25 L.J. (C.P.), 195.

⁽⁴⁾ Lofft, 55.

⁽⁵⁾ 2 Burr., 807.

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and the argument is founded upon a note of Holroyd, J., in *Hodgson v. Scarlett* ⁽¹⁾. But the whole question is set at rest by the decision of the Exchequer Chamber in *Henderson v. Bromhead* ⁽²⁾. There, as here, the plaintiff offered to prove that the matter sworn to was not only malicious and irrelevant, but false to the knowledge of the witness. But Erle, C.J., and the whole court were unanimous that no action was maintainable. Crompton, J., expressly held that, "no action lies for words spoken or written in the course of any judicial proceeding," and that "the rule is inflexible that no action will lie for words spoken or [265] written in the course of given *evidence." And Crowder, J., referring to *Revis v. Smith*, held that "it was a matter of public policy that no such action should be maintained."

Finally, in *Dawkins v. Lord Rokeby* ⁽³⁾, an action between the present parties tried before the late Mr. Justice Willes, that most learned and lamented judge, in alluding to the very evidence given by the defendant before the court of inquiry, which is the subject of this action, observed: "What he stated before the court he stated in the capacity of a witness; and assuming, apart from the reasons which I have already given, that no action would lie against him for what he did, there is the further overwhelming reason that witnesses are protected from actions for what they may have stated in evidence in a court of justice; otherwise, everybody in the witness-box would speak in fear of litigation; and no man who is called on to give evidence would be safe from some troublesome action being brought against him." Upon all these authorities it may now be taken to be settled law, that no action lies against a witness upon evidence given before any court or tribunal constituted according to law.

But it is insisted, on the part of the plaintiff, that a court of inquiry is not a court of law or a court of justice, and that witnesses before such a court are not within the protection of the law. On the other hand, it is contended, on the part of the defendant, that the evidence given by an officer in the army before a court of inquiry is a privileged communication, and cannot by law be made the subject of an action for defamation. It is further objected that any such evidence is part and parcel of the minutes of the proceedings of the court, which, when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and as such ought not, except by Her Majesty's command or permission, to be produced, and are, therefore, wholly inadmissible in evidence; and we are

⁽¹⁾ 1 B. & Ald. at p. 245; see per Alderson, B. in *Gibbs v. Pike*, 9 M. & W. at p. 358.

⁽²⁾ 4 H. & N., 569; 28 L. J. (Ex.), 360.
⁽³⁾ 4 F. & F., 806.

all of that opinion, and hold that on that ground also the exception must be disallowed.

It may be convenient to consider this point at once; for if it appear that the whole matter upon which the action is founded, whether the written statement handed into the court or the oral *testimony of the defendant, together with all secondary [266 evidence of the one or the other, is inadmissible by law, and ought not to have been received or permitted to be read at the trial, it is difficult to see how the action can be maintained. A court of inquiry, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is, nevertheless, a court duly and legally constituted, and recognized in the articles of war and many acts of parliament.

The 12th section of the articles of war provides: "That, if any officer shall think himself wronged by his commanding officer, and shall, upon due application made by him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding-in-chief of our forces in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our secretary of state for war, to make his report to us thereupon, in order to receive our further directions."

Now the mode in which the commander-in-chief examines into any such complaint is by instituting a court of inquiry. A court, therefore, so called into existence has all the qualities and incidents of a court of justice. It is convened, in pursuance of this provision, and so under the express authority of parliament, and of the queen's regulations, which, as set forth upon this record, provide as follows: "A court of inquiry may be assembled by any officer in command to assist him in arriving at a correct conclusion on any subject on which it may be expedient for him to be thoroughly informed. With this object in view such court may be directed to investigate and report on any matter that may be brought before it; but it has no power to administer an oath nor to compel the attendance of witnesses not military." From this it follows that a military witness is compellable to attend and to give evidence. The regulations proceed: "A court of inquiry is not to be considered in any light as a judicial body. It may be employed at the discretion of the commanding officer to collect and to record information only, or it may be required to give an opinion also on any proposed question. The proceedings are to be recorded in writing as far as practicable in the form prescribed for courts martial, signed by each member, and forwarded to the *convening au- [267 thority" (in this case the commander-in-chief) "by the president."

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Under these regulations officers in the army, if required by competent military authority to attend, are compellable to attend and give evidence, not, indeed, by means of any known legal process, or under any penalty imposed by law, but in obedience to the duty they owe to the sovereign, and under peril of dismissal at the pleasure of the sovereign in case of disobedience. The evidence so given is in truth a communication made at the command of the sovereign, through the commander-in-chief, by a military officer, to an assembly consisting of other military officers upon a military subject, to be reported to the commander-in-chief, and by him to the sovereign; and all this in strict conformity to the queen's regulations. There is, therefore, no sound reason or principle upon which such a witness, called upon to give evidence in such a court, should not be entitled to the same protection and immunity as any other witness in any of the courts of law or equity in Westminster Hall. He is equally compellable to appear and give evidence, and punishable in case of refusal. And it would be unreasonable and unjust to hold him liable to a heavy punishment if he refuse to answer the question put to him, and liable to an action at law for damages if he answers them and his answers happen to reflect upon the character of another. It may be said that if the evidence given in a court of law be false, the witness is indictable for perjury; and that if he go out of his way to slander another by uttering irrelevant and defamatory matter, he may be fined or imprisoned for a contempt of court.

But, besides that no punishment inflicted on a false witness affords compensation or redress to the party injured, a witness before a court of inquiry, if he defames the character of another by false and malicious statements, whether relevant or not to the matter inquired into, is equally subject to punishment with a witness in a court of law, and may be put upon his trial before a court martial, and if found guilty may be dismissed the service, or otherwise dealt with as justice may require. And in this very case the plaintiff sought redress by demanding a court martial upon the defendant. And we must presume that his [268] *complaint was shown to be groundless inasmuch as the court martial was refused. And it was upon this refusal, as it should seem, that he brings this action in a court of law.

But another ground on which this action must fail, and which embraces the great variety of cases in which statements made, whether orally or in writing, are privileged and protected, is that by reason of the occasion on which they are made, the making of them is not such a publication as will support an action for libel or slander. On this ground, whatever is said,

however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity or in county courts, or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the legislature in either house of parliament, or by ministers of the crown in advising the sovereign, is absolutely privileged, and cannot be inquired into in an action at law for defamation. The case of *Home v. Bentinck* (*) when carefully considered, although decided upon a bill of exceptions to the rejection of evidence, is really an authority that the present action cannot be maintained; and, being a decision of the Exchequer Chamber, may be taken to have settled the law upon this important subject.

In that case, as in this, a court of inquiry had been held, touching the conduct of the plaintiff, convened by the duke of York, then commander-in-chief, and a report had been made and delivered personally by the president to his Royal Highness; and the action was brought by the plaintiff against the president; the declaration charging the report as a libel. The minutes, consisting of the evidence and the report, were produced at the trial by the military secretary of the commander-in-chief, and it was objected that these minutes ought not to be admitted, and could not be read in evidence on behalf of the plaintiff. Abbott, C.J., held the evidence inadmissible, and it was rejected accordingly. The plaintiff then offered, as secondary evidence, a copy of the minutes; but this was also held inadmissible, and rejected by the lord chief justice. Upon a bill of exceptions to the rejection of this evidence, the case came before the Exchequer Chamber, and was very elaborately argued, and all the authorities bearing upon the points in question were brought *before the court by the late Mr. [269 Joshua Evans. The court, however, disallowed the exception, and their judgment clearly shows that the entire proceeding before a court of inquiry is privileged, and cannot be produced, or read in evidence upon any trial at law. The court of inquiry was held to be "an official proceeding directed by the commander-in-chief, for the purpose of obtaining information which he was bound to obtain, as to the conduct of an officer holding a commission in the army, and in furtherance of the exercise of his public duty," whatever it might be upon the result of such inquiry. The duty of the then defendant, as the presiding officer, was held to be imperative upon him, and the report which he had made an act of duty imposed upon him as a military man by his superior officer, the commander-in-chief, whose order he was bound to obey. It is impossible to deny that it was

(*) 2 B. & B., 130.

equally a duty imposed upon the defendant in the present case to attend as a witness, and to give evidence upon the court of inquiry, as called upon to do by the president himself, acting under the orders of the commander-in-chief, and which orders the president and the defendant were alike bound by their duty to the sovereign to obey. And it was observed by Dallas, C.J., in delivering the judgment of the court in *Home v. Bentinck* (¹), that it was impossible not to see that the plaintiff in that case, when he became an officer in the army, in point of fact voluntarily subjected himself to that court of inquiry to which he must have known that officers in other instances had been made amenable. After remarking that the evidence had been returned and deposited with the commander-in-chief, the chief justice proceeds: "The question then is, whether, I will not say Sir Henry Torrens would have been compelled to produce the result of this inquiry, but whether if he, under a mistake, had been disposed so to do, it would not have been the bounden duty of the learned judge before whom the cause was tried, considering that this document was a secret, not a privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence." And, further: "This is an inquiry to be made by the commander-in-chief with a view to ascertain what the conduct of the party suspected might have been; in the course of 270] which a *number of persons may be called before the court, and may give information as witnesses which they would not choose to have disclosed; but if the minutes of the court of inquiry are to be produced in this way on an action brought by the party, they reveal the name of every witness, and the evidence given by each. . . . It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed; and, therefore, independently of the character of the court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures, and involving delicate inquiry and the names of persons, stand protected." And, finally: "It seems therefore to us, upon the broad principle of state policy and public convenience, and upon the principle of all the cases cited, that the chief justice of the Court of King's Bench was perfectly right in not suffering these minutes to be brought forward at the trial." Surely this case, the decision of a court of error, is a conclusive authority that a court of inquiry is a tribunal authorized, recognized and sanctioned by law, and that the proceedings and the minutes of the proceedings of such a court are privileged against publication, and are inadmissible in evidence upon the trial of

(¹) 2 B. & B., at pp. 161, 164.

an action like this. We cannot doubt, therefore, that if the attention of the judge who tried the cause had been called to this decision, although the parties had admitted the evidence in question, as given before the court of inquiry, he would have felt it, to use the language of Chief Justice Dallas, "his bounden duty to have interposed and prevented the admission of such evidence." If, then, in the present case, the evidence of the proceedings before the court of inquiry was inadmissible by law, and ought never to have been permitted to have been produced in court, how is it possible that this action can be maintained?

But there is another and a higher ground upon which we are of opinion that the defendant is entitled to the judgment of the court. The whole question involved in this cause is a military question, to be determined, as we think, by a military tribunal, and not cognizable in a court of law. The attendance of the defendant as a witness, the duty to give evidence when called upon, the validity of the order to hold a court of inquiry, the effect of the evidence upon the military character and upon the military rights and liabilities of the plaintiff, and indeed [271] of the defendant likewise, are purely questions of a military nature. The evidence itself was given by the defendant, a military officer in his military capacity upon a military subject, at the command of his military superior, and concerning the military conduct of another military officer. It may well be that the truth or falsity of the evidence given is also a military question, although apparently in terms a question of fact; and that which the plaintiff might allege, and a court of law or a jury might hold, to be false, a military tribunal might hold, and rightly hold, to be true; as if the defendant had deposed that he had given an order to the plaintiff which it was his duty to have obeyed, but which he had disobeyed. The order might have been to seize a battery, and the plaintiff might have alleged that he had done all that could be done, and that it was impracticable, and that the defendant knew that it was so; and a jury might find all this to be true. But an assembly of military officers might hold, and justly and truly, that the order might, and could, and ought to have been obeyed. With reference, therefore, to such questions, which are purely of a military character, the reasons of Lord Mansfield and the other judges in *Sutton v. Johnstone* ⁽¹⁾, and the cases *In re Mansergh* ⁽²⁾, and *Grant v. Gould* ⁽³⁾, *Barwis v. Keppel* ⁽⁴⁾, *Keighly v. Bell* ⁽⁵⁾, *Dawkins v. Lord Rokeby* ⁽⁶⁾, and *Dawkins v. Lord F. Paulet* ⁽⁷⁾,

(1) 1 T. R., 493.

(2) 1 B. & S., 400; 80 L. J. (Q.B.), 296.

(3) 2 H. Bl., 69.

5 ENG. REP

(4) 2 Wils., 314.

(5) 4 F. & F., 763.

(6) 4 F. & F., 806.

(7) Law Rep., 5 Q. B., 94.

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are all authorities to show that a case involving questions of military discipline and military duty alone are cognizable only by a military tribunal, and not by a court of law.

On the other hand, the case for the plaintiff, when attentively considered, is really destitute of all authority to support the action. No one decision is to be found that an action for libel or slander is maintainable upon evidence given before any tribunal constituted, sanctioned, or recognized by or according to law. There is, indeed, in the eloquent and powerful reasoning of Lord Chief Justice Cockburn in *Dawkins v. Lord F. Paulet* ⁽¹⁾, much which is opposed to the view we take of the incompetence 272] of a court of law to *deal with purely military questions arising before a military tribunal. But the opinion thus delivered, though resting upon high authority, is no decision upon the question before us, or upon any cognate question. And it is satisfactory to us to feel that the general question of privilege, as applied to communications between military authorities upon military subjects, and whether before a military tribunal or otherwise, though governed, and, as we think, for the present decided, by the decisions referred to in the Exchequer Chamber, is yet open to final consideration before a court of the last resort.

It remains to us only to consider two cases upon which the plaintiff has relied as authorities in his favor. And, first, *Warden v. Bailey* ⁽²⁾, which, however, merely shows that the adjutant of a regiment of militia has no authority to order a private to attend a school and pay eightpence a month for instruction, and that trespass lies for causing him to be imprisoned in a common jail for disobedience to such an order. This was not an act done which, though in excess, was in the exercise of military authority or in the discharge of military duty, but was simply a wrongful and illegal act, without any color of law, as if an officer had ordered a soldier to be imprisoned in a debtors' prison for non-payment of an alleged debt. *Dickson v. Lord Willon* ⁽³⁾, also relied upon by the counsel for the plaintiff, is distinguishable in this, that the libel there charged was a communication made by the defendant to a higher military authority, not in any proceeding before a military tribunal, or in obedience to the order of a superior officer, but which, though, as he alleged, in the discharge of his duty, was contended by the plaintiff to have been made, and was in fact made, voluntarily and of his own accord. But were the facts of the two cases identical? We think, with the majority of the judges in *Dawkins v. Lord F. Paulet* ⁽¹⁾, that the motives, as well as the

⁽¹⁾ Law Rep., 5 Q. B., 94.

⁽²⁾ 1 F. & F., 419.

⁽³⁾ 4 Taunt. 67.

duty of a military officer, acting in a military capacity, are questions for a military tribunal alone, and not for a court of law to determine.

It may also be observed that the case of *Dickson v. Lord Wilton* ⁽¹⁾ was a mere *nisi prius* decision, and not reviewed upon *motion for a new trial; and that the ruling of Lord [273 Campbell, that the communication charged as a libel, though held by the secretary for war on behalf of the crown, should be produced from his office and read in evidence, was directly at variance with the judgment of the Exchequer Chamber in *Home v. Bentinck* ⁽²⁾; and the decision that the communication itself was for the consideration of the jury upon the question of malice was inconsistent with the great mass of authorities above referred to.

On these grounds we are all of opinion that the exception in this case should be overruled, and that the defendant is entitled to the judgment of the court. *Judgment for the defendant.*

Attorneys for plaintiff; *Guscote, Wadhand, & Daw.*

Attorneys for defendant: *Frere, Cholmeley, Foster, & Frere.*

⁽¹⁾ F. & F. 419.

⁽²⁾ 2 B. & B., 130.

C A S E S
DETERMINED BY THE
COURT OF QUEEN'S BENCH,
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,
IN AND AFTER
EASTER TERM, XXXVI VICTORIA.

[Law Reports, 8 Queen's Bench, 274.]

April 22, 1873.

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*LAWRENCE V. JENKINS.

Prescriptive Obligation to maintain Fence — Nature of the Obligation — Con-sequential Damage.

The defendant was the occupier of a close adjoining a close occupied by the plaintiff. The defendant's close was woodland, and he sold the fallage of the timber to H., continuing himself to occupy the close. H. felled a tree in a negligent manner, so that it fell over the fence between the two closes, and made a gap in it. Two cows of the plaintiff soon afterwards got from the plaintiff's close through the gap into the defendant's close, and fed on the leaves of a yew tree which had been felled there by H., and died in consequence. The defendant had had no notice of the fence having been broken down before the escape of the plaintiff's cows. There was evidence that the defendant and his predecessors had for more than forty years repaired the fence (which was on his land) between the two closes whenever repairs were necessary; and that for the last nineteen years the fence had been repaired by the defendant and his predecessors upon notice by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired it was for the purpose of preventing cattle on the plaintiff's close from escaping into the defendant's close:

Held, that the evidence showed a prescriptive obligation on the part of the defendant to maintain the fence so as to keep in the cattle in the plaintiff's close; that the obligation was absolute to keep up a sufficient fence at all times, the act of God or *vis major* only excepted, without any notice of want of repair; that the damage was not too remote; and the defendant was therefore liable to the plaintiff for the loss of the cows.

CASE on appeal from the County Court of Monmouthshire holden at Newport.

*The plaintiff's cause of action was thus laid in the plaint- [275
The plaintiff claims 40*l.*, the damages sustained by reason of two of his cows, on or about the 27th of December, 1871, being killed from eating the foliage of a yew tree, which had been recently felled in a wood of the defendant, which adjoins the plaintiff's land, and into which wood the cows escaped from the plaintiff's land in consequence of the neglect of the defendant to repair a fence belonging to him dividing the wood and land, and which fence the defendant of right ought to maintain in repair.

The plaintiff was possessed of and occupied a close of land, and the defendant was possessed of and occupied another close of land, being woodland, adjoining the close of the plaintiff, and separated from it by a fence, which was on the defendant's close and was the property of the defendant.

In October, 1871, the defendant sold the fallage of the wood on his close to one Higgins, who accordingly, by his servants, felled the trees and underwood growing thereon; but the defendant did not part with any portion of the soil of his close, which he continued to occupy.

A short time before the 27th of December, 1871, the servants of Higgins felled a beech tree standing near the fence in such a manner that it fell over the fence and broke down a large part of it. The beech tree was felled in a negligent manner. Whilst the beech tree lay on the fence the branches filled up the gap made by its fall; but a few days afterwards the branches were removed by the servants of Higgins, and after they were so removed, until the 27th of December, there was a considerable gap or opening in the fence, sufficiently large for cattle to pass from one close to the other, during all which time the fence was out of repair; but it was not brought to the knowledge of the defendant or his bailiff that the fence had been so broken.

On the 26th of December, the servants of Higgins had felled a yew tree a few yards from the fence and near the spot where the beech tree had been felled. The yew tree was allowed to remain during the night of the 26th in the place where it had been felled. During the night of the 26th the plaintiff's cows, then being lawfully upon the plaintiff's close, escaped through the gap in the fence out of the close of the plaintiff into that of the *defendant, and in the morning of the 27th they were [276 found on the close of the defendant near the yew tree.

About midday on the 27th the cows died; and the judge found as a fact that they died from eating some of the foliage of the yew tree, which when eaten to excess is destructive to cattle. At that time of the year there was very little verdure or green food in the fields, and the cows from being foddered on dry food were the more inclined to browse the green foliage.

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Evidence was given that for more than forty years the fence had been repaired whenever repairs were necessary by the owners and occupiers of the defendant's wood; and also, that on several occasions during the last nineteen years the fence had been repaired by the defendant and his predecessors in estate upon notice being given to him or his bailiff by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired it was for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of it into the close of the defendant.

It was contended for the plaintiff, first, that the facts established an obligation on the part of the defendant to repair and keep in repair the fence for the purposes aforesaid; secondly, that the damage was not too remote to enable the plaintiff to maintain this action; thirdly, that the defendant was liable in this action. Each of these points was contested by the defendant, who also contended that the damage was attributable to the felling of the yew tree, relying on *Buller v. Hunter* ⁽¹⁾.

The judge found as a fact that there was an obligation on the part of the defendant to repair, and keep in repair the fence for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of the same into the close of the defendant.

He also considered that the damage was not too remote to enable the plaintiff to maintain this action.

The judge found as a fact that the escape of the cows from their own pasture was caused by the negligence of the servants of Higgins, either in not so felling the beech tree as to prevent its falling on the hedge, or if that was not preventible, in not 277] *temporarily fencing round the gap until the tree could be removed and the gap be properly stopped; and he was of opinion that it was the duty of Higgins to so cut and remove the wood as not to injure the rights of the plaintiff. He also found that, neither the defendant nor his bailiff, to whom the management of this woodland was entrusted, received notice of the fence having been broken down. And he held, on the authority of *Longmeid v. Holliday* ⁽²⁾, and *Buller v. Hunter* ⁽¹⁾, that Mr. Higgins (and not the defendant) was responsible for the loss of the cows, as the result of his servants' negligence; and he directed a non-suit to be entered.

In case of this decision being reversed on appeal, he assessed the plaintiff's damages at 40*l*.

The question for the opinion of the court was, whether the defendant is liable in this action.

⁽¹⁾ 7 H. & N., 826; 71 L. J. (Ex.), 214.

⁽²⁾ 7 H. & N., 826; 81 L. J. (Ex.), 214.

Jan. 17. *Herschell*, Q. C. (with him *Petheram*), for the plaintiff. The plaintiff's cause of action is founded, not on negligence, but on the breach by the defendant of the prescriptive obligation to maintain the fence for the plaintiff's benefit. This obligation, which is called in *Gale on Easements*, 4th ed. p. 460, a spurious easement, and is found by the judge to exist in the present case, must be absolute to maintain a sufficient fence at all times; and the want of notice is immaterial: see the precedent in *Bullen and Leake Pr. P.*, pp. 329-330, where all the cases are collected. The cases, therefore, on which the judge of the county court relied, have no application.

Michael, for the defendant. Conceding the cause of action to be founded on the prescriptive obligation to fence as against the plaintiff's cattle, still the defendant cannot be held liable without having reasonable time to mend the fence after notice of the defect. This notice is expressly negatived by the case, and the evidence showed that for nineteen years the defendant had repaired only after notice. It is clear that the defendant was not liable for the negligence of Higgins or his servants. He authorized, it is true, the felling of the trees, but not the felling of this particular tree in the way it was felled. In *Hole v. Sittlingbourne Ry. Co.* (¹), *Pollock, C. B., after putting cases [278 in which the person authorizing the doing of the work is liable, says, "Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act. The remedy is against the person who did it."

Herschell, Q. C., in reply.

Cur. adv. vult.

April 22. The judgement of the court (Cockburn, C J., Mellor and Archibald, JJ.), was delivered by

ARCHIBALD, J. (²) The only point in this case as to which we felt any degree of hesitation at the time of the argument, was the question whether or not the defendant was entitled to a reasonable time to repair the fence after he might or ought to have had notice that it had been broken down. For, assuming that the obligation to which he was subject was to maintain, at all times, and without notice to repair it, a sufficient fence for the benefit of the plaintiff's close, we had no doubt that the learned judge of the county court was wrong in holding that the defendant was not legally responsible for the loss of the plaintiff's cows.

We concur in opinion with the learned judge, that the damage was not too remote; but we think that the cases cited by him:

(¹) 6 H. & N. at p. 497; 30 L. J. (Ex.), 81. (²) The judgment was read by Mellor, J.

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Longmeid v. Holliday ⁽¹⁾ and *Buller v. Hunter* ⁽²⁾, are inapplicable; and, without expressing any opinion as to the liability of Higgins, we are of opinion that, if the obligation to maintain the fence be such as we have assumed, the defendant would be liable in this action.

On further consideration we have come to the conclusion, upon the evidence set forth in the case, that the defendant was bound at his peril to maintain at all times, and without notice to repair it, a sufficient fence; and that, except in the case of damage by the act of God or *vis major* he would be answerable for damage sustained by cattle escaping from the plaintiff's close by reason of the defective state of the fence, and proximately due to that cause.

At common law the owners of adjoining closes are not bound to 279] *fence either against or for the benefit of each other; but in the absence of fences each owner is bound to prevent his cattle or other animals from trespassing on his neighbor's premises.

By prescription, however, a landowner may be bound to maintain a fence upon his land for the benefit of the occupier of the adjoining close. This obligation is described by Gale in his work on Easements as in the nature of a spurious easement affecting the land of the party who is bound to maintain the fence: Gale on Easements, 4th ed. p. 460; *Star v. Rookesby* ⁽³⁾; *Boyle v. Tamlyn* ⁽⁴⁾.

A party entitled by prescription to the benefit of the fence might formerly, by means of means of a writ *de curia claudenda* (Fitzh. Nat. Brev., 127), have compelled the adjoining owner to repair it, and have recovered damages as well for the non-repair; and a plea in an action of trespass for injury done by cattle, that the plaintiff is bound by prescription to fence against the defendant's cattle is a good plea: *Nowel v. Smith* ⁽⁵⁾ — the party bound by prescription being answerable to the owner for whose benefit the fence is to be maintained for all damage reasonably attributable to its defective condition.

It was held, therefore, in an anonymous case in Ventris ⁽⁶⁾, where a horse of the plaintiff's escaped into the defendant's field through defect of a fence which the defendant was bound to maintain, and was killed by falling into a ditch in the field, that the defendant was liable; and in a later case, *Rooth v. Wilson* ⁽⁷⁾, that it made no difference that the plaintiff was only a gratuitous bailee of the horse which escaped and was killed. The same

⁽¹⁾ 6 Ex., 761; 20 L. J. (Ex.), 430.

⁽²⁾ 7 H. & N., 826; 31 L. J. (Ex.), 214.

⁽³⁾ 1 Salk., 835.

⁽⁴⁾ 6 B. & C., at pp. 337-9.

⁽⁵⁾ Cro. Eliz., 709.

⁽⁶⁾ 1 Vent., 264.

⁽⁷⁾ 1 B. & Ald., 59.

view of the law was acted upon in the case of *Powell v. Salisbury* (¹), where the defendant was held liable for the loss of cattle which escaped from an adjoining field through a defective fence which he was bound to repair, and were killed on his premises by the falling of a haystack.

In all these cases, however, the prescription to maintain and repair obviously implies the pre-existence of the fence, and the right consequently to have it always existing as a fence, in other words, in a condition sufficient both to prevent the cattle [280 of the owner entitled to it from escaping out of his close, and also to protect him from trespasses by his neighbor's cattle, and renders it, we think, incumbent on the party upon whom the prescriptive obligation is imposed to repair the fence in time to prevent its becoming defective, and subjects him to all risks of injury that may be done to it by strangers or trespassers.

We think, therefore, that, as the true nature of the prescription is that the defendant was bound at his own risk to have a sufficient fence always existing, he was liable to the plaintiff notwithstanding he had no knowledge of the injury done to the fence; and consequently that the decision of the County Court should be reversed, and judgment given for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Jones & Stirling, for Cuthcart, Newport, Monmouthshire.*

Attorneys for defendant: *Thomas White & Son.*

(¹) 2 Y. & J., 391.

There may be a valid prescription binding the owner of land to maintain perpetually the fence between him and the adjoining proprietor. *Adams v. Van Alstyne*, 35 N. Y., 232, affirming 35 Barb., 9; *Harlow v. Stinson*, 60 Maine, 347; Washburn on Easements (2d ed.), 601.

The plaintiff's farm adjoined the defendant's and each maintained a separate portion of the division fence. The defendant's sheep escaped from his pasture into the plaintiff's wheat field through a break in the defendant's part

of the fence, and injured the growing crop. That part of the fence had been recently built, of good and suitable material and was in good order up to the day before the escape, but during the night of that day one length of the fence was broken down by a log being thrown upon it by some person unknown, and the sheep escaped through the break thus made. Held that the defendant was liable. *Krom v. Kirkendall*, 1 Albany Law Jour., 238, N.Y. Supreme Court, 7th District.

[Law Reports, 8 Queen's Bench, 280.]

Jan. 30,* 1873.

JONES V. WILLIAMS.

"Costs to abide the event"—New trial — Payment into Court — Result.

If a rule for a new trial contains the term "costs to abide the event," the "event" whereon the costs will depend is the event of the fresh contest as to the particular ground of dispute in respect of which the court granted the rule.

RULE calling upon the defendant to show cause why a master of the court should not review his taxation of costs by giving the plaintiff his costs down to and including payment into court.

An action brought by the plaintiff to recover an amount composed of two claims, viz., 61*l.* 19*s.* 6*d.* for work done, and 5*l.* for money lent, was tried on the 11th of July, 1871, at the Hampshire Spring Assizes, before Willes, J., when the jury found a verdict in favor of the plaintiff for the whole amount, whereupon leave was given to the defendant to move for a new 281] trial on the ground that the *verdict was against the weight of evidence, unless the plaintiff would consent to reduce the damages to 5*l.* 2*s.* 10*d.*, a sum to which he was, according to the expressed opinion of the learned judge, clearly entitled.

A rule was obtained for a new trial, pursuant to the leave reserved, and was made absolute, with the term "costs to abide the event."

The venue having been changed to Middlesex, the cause was set down for trial on the 24th of May, and the defendant, upon the 16th of that month, obtained an order by consent, to amend his pleas, by adding a plea of payment into court of 5*l.* 2*s.* 10*d.*, the costs of and incidental to the amendment to be the plaintiff's in any event.

That plea was then added, and payment into court made.

Upon the 28th of May the new trial took place. The jury were of opinion that the defendant was only liable to the plaintiff for the sum paid into court, and a verdict was consequently entered for the defendant.

On taxation of costs, the master allowed the defendant his costs of the second trial; whereupon the present rule was obtained.

McIntyre, Q.C., showed cause.⁽¹⁾ The term "costs to abide the event," means the substantial event of the verdict, with all costs incidental thereto. The plaintiff succeeded unjustly at the first trial, and would not be entitled to those costs unless he

*Decided in Hilary Term.

(1) In the Bail Court, before Blackburn, Lush, and Archibald, JJ.

had a verdict in the second, carrying all such incidents. Suppose there had been no payment into court, and that 5*l.* only had been recovered on the same issue.

[BLACKBURN, J. *Dawson v. Harris* ⁽¹⁾, seems to be an authority in your favor; there Erle, C.J., says, the "event" was the event of the dispute.]

Yes; because the plaintiff got an improper verdict for a larger amount than that to which he had a right he ought not to be in a better position than if he had recovered the just debt. Moreover, the provisions of the County Court Acts, limiting costs, apply.

[*BLACKBURN, J. If the event were the same, I cannot [282 think that the fact of the second verdict being rather below the statutory limit of 20*l.* would affect it.]

The substantial question certainly is, whether the event was such as to entitle him to costs.

[ARCHIBALD, J. He fails to recover in respect of that claim for which the new trial was granted.]

Certainly. Erle, C.J., says in the above case that the meaning of the words in question is "the event in respect of which the contest took place at the trial and upon the argument of the rule." ⁽²⁾

Charles Bowen, in support of the rule. *Dawson v. Harris* ⁽³⁾ is distinguishable, for there no claim was made at the first trial under the second count of the declaration for the sum which was actually recovered thereon in the later action. But here the total amount was demanded and the general liability in contest at both trials. In *Meule v. Goddard* ⁽⁴⁾, where a similar phrase was discussed, it was held that the word "event" meant the ultimate event of the cause, and that therefore, if the verdict on the second trial be set aside, and on a third trial, the ultimate event is the same as at the first, the party will be entitled to the costs of the second.

[BLACKBURN, J. Because the second was annulled, and so the third took its place. That case is well enough, but neither helps nor hinders the present argument.]

When the rule was argued, the question discussed was the one of general liability, and the rule was not limited to part of the claim. The defendant took advantage of the opinion pronounced by the learned judge of the first trial, and paid money into court. Can the right of the plaintiff to costs be thus defeated when he was forced to trial because no earlier payment was made? The master would have great difficulty in ascertaining the identity

⁽¹⁾ 11 C. B. (N.S.), 801; 81 L. J. (C.P.), 168. ⁽²⁾ 11 C. B. (N.S.), 301; 81 L. J. (C.P.), 168.

⁽³⁾ 11 C. B. (N.S.), at p. 808.

⁽⁴⁾ 5 B. & Ald., 766.

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of the "event" by an inquiry into what took place at the trial and argument of the rule.

BLACKBURN, J. I think that this rule must be discharged. 283] *The phrase "costs to abide the event," a term well known to the law for a long time, means if the event is the same to the party who had the verdict at the former trial the party gets his costs, and if the event is not the same the costs of the first trial are thrown away. Now, what does the word "event" as here used mean? If the matter were *res integra*, I should say that it means this, viz., that inasmuch as the court granted the new trial because they were satisfied that in respect of something or other the verdict was against the weight of evidence, the "event" on which the question as to the costs of the former trial depends is the event of the ground on which the court disturbed the first trial. In this case it appears, that after the first trial the defendant had persuaded Wiles, J., and this court, that the verdict was wrong as to 51*l.*; and if, at the second trial, it had turned out that the verdict in the first on that question was right, then it would be reasonable and proper that the plaintiff should have the costs of both trials. But when, on the second trial, it turns out that the court was right in supposing that the verdict was against the weight of evidence as to 51*l.*, and the jury find that he is not entitled to recover, it would seem monstrous injustice to say that because he succeeds on some minor point he should have the costs of the first trial upon a verdict to which he was not entitled. That would seem to be common sense, and right and justice, apart from authority. But in *Dawson v. Harris* (¹) I find a distinct authority on the very point in the reasons that the court give for their decision. True, that in the report of the case in the Common Bench Reports, Erle, C.J., is stated to have said something about the event "so far as regards the matter which was before in contest" (p. 803), which does not appear in the Law Journal Report. But whether those words were really uttered or not, the ground on which the court proceeded, rightly or wrongly, is clear, viz., that if it turns out that the ground on which the defendant set aside the verdict and got a new trial was wrong, the plaintiff is entitled to the costs of both trials; but if, on the contrary, it turns out that he who set aside the verdict was right, the plaintiff is not to have those costs; and, looking at the words Erle, C.J., is reported to have used, that seems to be the decision.

284] *Mr. Bowen argues that the master cannot practically tell what that event is; but I think the master could ascertain it more easily than many other things which he has to consider.

(¹) 11 C.B., (N. S.), 801; 31 L. J., (C. P.), 168.

It is his duty, to ascertain what was the ground on which the court granted a new trial, and to see if that has been determined or not. He might come to a wrong conclusion, because masters are not infallible; but the question here for him is not half so difficult as those the masters have daily to decide, such as the number of witnesses necessary to have been called, the amount to be paid on briefs delivered, and the like.

I would wish to add, by way of illustrating the word "event," that I do not think that the question depends entirely on damages. A conceivable case is this: an action for negligence, verdict for the plaintiff 1000*l*. The court decided that the verdict is against the weight of evidence, and that the case should be sent to another jury. I think the "event" there would be a verdict establishing negligence, or a verdict not establishing negligence, and although it might turn out that the verdict for 1000*l*. was superseded by one for 50*l*. only, still I think that as a verdict was given for the plaintiff upon the ground of negligence, that would be a determination of the event in his favor. Where the verdict depends on the amount recovered, special proviso would probably be made by the court in the rule that "costs are to abide the event if the plaintiff recovers more than so and so, not otherwise." That is usually provided for in cases where the rule is granted on the ground that the verdict is against the weight of evidence by the Common Law Procedure Act, 1854, s. 44; or, as in the present case, it is specially provided for by the rule. No one can dispute that the verdict as to the 61*l*. was the real event on which the new trial was granted.

LUSH, J. I think *Dawson v. Harris* ⁽¹⁾ a direct authority to show that this rule should be discharged. In order to ascertain whether there has been the "event" in contemplation of the court, we must see what they granted the new trial for, and what was the question between the parties. It is clear that the rule was granted in order to determine whether the plaintiff was right in contending *he was entitled to the 61*l*. [285 or not, 5*l*. being no longer in dispute. The latter sum was paid into court, and the contest was whether he was entitled to 61*l*. The "event" in the mind of the court was the result of his attempt to prove his right to the larger amount.

ARCHIBALD, J. A rule here was granted on the ground that the first verdict was against the weight of evidence; but the only contest was as to the excess of the claim beyond the 5*l*. And if the first verdict had been only for 5*l*., no new trial would have been granted. Substantially, therefore, the new trial was granted to ascertain whether the 61*l*. of the first verdict was

(¹) 11 C. B. (N.S.), 801; 81 L. J. (C.P.), 168.

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rightly or wrongly given by the jury. That was decided in favor of the defendant. Nothing was in the second trial recovered on that part of the claim, and I am therefore of opinion that the event as to which the new trial was granted has been decided in favor of the defendant.

BLACKBURN, J. I find from the master that it is not usual to grant costs where the rule is to review his taxation, unless special circumstances appear. In the present case no costs will be allowed.

Rule discharged.

Attorney for plaintiff: *Richard Jones.*

Attorney for defendant: *F. H. Williams.*

[Law Reports, 8 Queen's Bench, 286.]

April 25, 1878.

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*HARRIS v. NICKERSON.

Auctioneer, Liability of — Withdrawal of Goods Advertised for Sale.

The defendant, an auctioneer, advertised in the London papers that certain brewing materials, plant, and office furniture would be sold by him at Bury St. Edmunds on a certain day and two following days. The plaintiff, a commission broker in London, having a commission to buy the office furniture, went down to the sale; on the third day, on which the furniture was advertised for sale, all the lots of furniture were withdrawn. Upon which the plaintiff brought an action against the defendant to recover for his loss of time and expenses:

Held, that plaintiff could not maintain the action: for that the advertising the sale was a mere declaration and did not amount to a contract with any one who might act upon it, nor to a warranty that all the articles advertised would be put up for sale.

CASE on appeal from the City of London Court.

The following were the particulars of claim: This action is brought to recover 2*l.* 16*s.* 6*d.* for two days' loss of time by the plaintiff, at the special instance and request of the defendant, on the plaintiff attending at a public sale by auction, advertised by the defendant in the London newspapers to be held at the town of Bury St. Edmunds, on the 14th of August, 1872, for the disposal of certain goods and office fittings under bills of sale, and on the faith of which the plaintiff duly attended, and was ready to purchase in pursuance of such request and public notification aforesaid; but the defendant, in breach thereof, did suddenly and without notice withdraw the said goods and office fittings from the sale, and by which the plaintiff lost not only his two days' time and railway fare, but the additional expense of two days' board and lodging.

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Two days' loss of time . . .	£1	1	0	
Third-class railway fare . . .	0	14	6	
Two days' board and lodging . . .	1	1	0	
	£2	16	6	

At the hearing it was proved that the sale was advertised as stated by the plaintiff, and catalogues circulated and distributed. A copy of the catalogue was put in evidence, by which it appeared that "under bills of sale" certain brewing materials, plant, and office furniture, would be sold by auction by Mr. Nickerson (the *defendant), at Bury St. Edmunds, on [287 Monday, 12th of August, 1872, and following days. The conditions were the usual conditions; the first being "The highest bidder to be the buyer."

It was also proved that the plaintiff had a commission to purchase at the sale the "office furniture," advertised to be sold.

The plaintiff went to Bury St. Edmunds and attended the sale, and purchased lots other than those described in the catalogue as "office furniture."

The articles described as "office furniture" were not put up for sale, but were withdrawn.

On these facts the judge gave judgment for the plaintiff, but at the request of the defendant, gave him leave to appeal.

If the court was of opinion that the plaintiff was not entitled to recover, the judgment was to be set aside and a nonsuit entered.

Macrae Moir, for the defendant, contended that it was clear that the mere advertising of a sale did not amount to a contract with anybody who attended the sale that any particular lot, or class of articles advertised, would be put up for sale. He referred to *Warlow v. Harrison* ⁽¹⁾; and *Payne v. Cave*. ⁽²⁾

[QUAIN, J. referred to *Mainprice v. Westley*. ⁽³⁾]

Warton, for the plaintiff, contended that the advertisement of the sale by the defendant was a contract by him with the plaintiff, who attended the sale on the faith of it, that he would sell the property advertised according to the conditions; and the withdrawal of the property after the plaintiff had incurred expenses in consequence of the advertisement was a breach of such contract. A reasonable notice of the withdrawal, at all events, ought to have been given. He likened the case to that of an advertisement of a reward, which, though general in its inception, becomes a promise to the particular person who acts

⁽¹⁾ 1 E. & E., 295, 809; 28 L. J. (Q.B.), ⁽²⁾ 3 T. R., 148.

18; 29 L. J. (Q.B.), 14.

⁽³⁾ 6 B. & S., 420; 34 L. J. (Q.B.), 229.

upon it before it has been withdrawn. ⁽¹⁾ He referred to *Spencer v. Harding*. ⁽²⁾

Macrae Moir was not heard in reply.

BLACKBURN, J. I am of opinion that the judge was wrong. 288] *The facts were that the defendant advertised *bonâ fide* that certain things would be sold by auction on the days named, and on the third day a certain class of things, viz., office furniture, without any previous notice of their withdrawal, were not put up. The plaintiff says, inasmuch as I confided in the defendant's advertisement, and came down to the auction to buy the furniture (which it is found as a fact he was commissioned to buy) and have had no opportunity of buying, I am entitled to recover damages from the defendant, on the ground that the advertisement amounted to a contract by the defendant with anybody that should act upon it, that all the things advertised would be actually put up for sale, and that he would have an opportunity of bidding for them and buying. This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or traveling expenses. As to the cases cited: in the case of *Warlow v. Harrison* ⁽³⁾, the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest *bonâ fide* bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids there is a breach of the contract; there is very plausible ground at all events for saying, as the minority of the court thought, that the auctioneer warrants that he has power to sell without reserve. In the present case, unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, or be liable to an action, we cannot hold the defendant liable.

QUAIN, J. I am of the same opinion. To uphold the judge's decision it is necessary to go to the extent of saying that when an auctioneer issues an advertisement of the sale of goods, if he withdraws any part of them without notice, the persons attending may all maintain actions against him. In the present 289] case, it is *to be observed that the plaintiff bought some other lots; but it is said he had a commission to buy the fur-

⁽¹⁾ See *Williams v. Carwardine*, 4 B. & ⁽²⁾ 1 E. & E. at pp. 314, 318; 29 L. J. Ad., 621. (Q.B.), 14.

⁽³⁾ Law Rep., 5 C. P., 561.

niture, either the whole or in part, and that therefore he has a right of action against the defendant. Such a proposition seems to be destitute of all authority; and it would be introducing an extremely inconvenient rule of law to say that an auctioneer is bound to give notice of the withdrawal or to be held liable to everybody attending the sale. The case is certainly of the first impression. When a sale is advertised as 'without reserve, and a lot is put up and bid for, there is ground for saying, as was said in *Warlow v. Harrison* ⁽¹⁾, that a contract is entered into between the auctioneer and the highest *bonâ fide* bidder; but that has no application to the present case; here the lots were never put up and no offer was made by the plaintiff nor promise made by the defendant, except by his advertisement that certain goods would be sold. It is impossible to say that that is a contract with everybody attending the sale, and that the auctioneer is to be liable for their expenses if any single article is withdrawn. *Spencer v. Harding* ⁽²⁾, which was cited by the plaintiff's counsel, as far as it goes, is a direct authority against his proposition.

ARCHIBALD, J. I am of the same opinion. This is an attempt on the part of the plaintiff to make a mere declaration of intention a binding contract. He has utterly failed to show authority or reason for his proposition. If a false and fraudulent representation had been made out, it would have been quite another matter. But to say that a mere advertisement that certain articles will be sold by auction amounts to a contract to indemnify all who attend, if the sale of any part of the articles does not take place, is a proposition without authority or ground for supporting it.

Judgment for the defendant.

Attorney for plaintiff: *H. Sydney.*

Attorneys for defendant: *Young, Jones, Roberts, & Hale.*

[Law Reports, 8 Queen's Bench, 290.]

April 22, 1878.

*HAWTRY AND ANOTHER V. BUTLIN AND ANOTHER. [290]

Mortgages—Mortgagor and Mortgagee—Registration under Bills of Sale Act (17 & 18 Vict. c. 86).

H., a lessee for years, demised by indenture of mortgage to the plaintiffs certain buildings used as an iron factory for the residue of the term, except the last two days, and by the same indenture he also assigned to the plaintiffs all the machinery, plant, fixtures, implements, utensils, and effects, then or thereafter to be fixed to or used in or about the buildings, subject to redemption on payment of the mortgage money and interest:

⁽¹⁾ 1 E. & E., at p. 314; 29 L. J. (Q.B.), 14.

⁽²⁾ Law Rep., 5 C. P., 661.

Held, that the indenture, being an assignment of fixtures, was an assignment of personal chattels within the Bills of Sale Act, and required registration.

Boyd v. Shorrocks (Law Rep. 5 Eq., 72) dissented from; *Begbie v. Fenwick* (24 Law Times (N.S.) 58) followed.

SPECIAL case stated under 23 & 24 Vict. c. 126, s. 15, on an interpleader and issue without pleadings.

1. The defendants recovered judgment against one F. Hamilton on the 14th of September, 1872, for the sum of 25*l.* 5*s.* 8*d.*, and 3*l.* 8*s.* 0*d.* costs of suit, making together the sum of 28*l.* 13*s.* 8*d.*

2. On the same day on which judgment was signed a writ of *fiery facias* was issued by the defendants against Hamilton endorsed to levy 28*l.* 13*s.* 8*d.* and 1*l.* 5*s.* costs of the writ.

3. Hamilton was, at the time of the issuing of the writ, an iron founder, carrying on his business at the Hercules Foundry, Golden Lane, in the county of Middlesex, which premises were held by Hamilton under an indenture of lease for a term, of which about sixteen years are unexpired, which indenture of lease was assigned to Hamilton by indenture in the year 1868, and by which indenture of assignment the fixed and movable machinery, plant, fixtures, implements, utensils, and effects fixed to or placed upon or used in the premises were absolutely assigned to Hamilton.

4. By an indenture of mortgage of the 20th of March, 1872, Hamilton demised to the plaintiffs the premises for the residue of the term, except the last two days, and assigned to the plaintiffs all and singular the fixed and movable machinery, plant, fixtures, implements, utensils, and effects, then or thereafter to 291] be fixed to *or placed upon or used in or about the premises and then or thereafter belonging to Hamilton, subject to redemption on payment of the amount of mortgage debt and interest (¹).

5. The fixed machinery, plant, and fixtures, assigned by the indentures of assignment of 1868, and by the indenture of mortgage of March, 1872, consisted solely of such articles as are known as trade fixtures.

6. The mortgage debt, with interest, is still owing to the plaintiffs.

7. The indenture of mortgage referred to in paragraph 4 has not been registered under the Bills of Sale Act.

(¹) The deed contained two operative parts; by the first, the ground, messuages, or tenements were conveyed to the plaintiffs for the residue of a term of sixty-three and a half years except the last two days thereof; by the second, Hamilton assigned unto the plaintiffs, "their executors, administrators, and

assigns, all and singular the fixed and movable machinery, plant, fixtures, implements, utensils, and effects, now or hereafter to be fixed to or placed or used in or about the said demised hereditaments, messuages, or tenements, or premises . . .

8. On or about the 15th of September, 1872, the sheriff of Middlesex, by virtue of the writ of *fi. fa.*, seized the fixed machinery, plant, fixtures, and effects, as well as the movable or unfixed machinery and effects, all of which were at the time of such seizure in the apparent possession of Hamilton, and the plaintiffs thereupon duly claimed the fixed articles as their property under the indenture of mortgage referred to in paragraph 4. After the sheriff had issued the interpleader summons the plaintiffs paid into court 36*l.* to abide the decision of the court upon this case.

9. The plaintiffs contend that registration under the Bills of Sale Act of their indenture of mortgage is unnecessary in respect of the fixed machinery, plant, and fixtures, and that the same became duly vested in them by the indenture of mortgage, and are not liable to a seizure for a debt of the said Hamilton.

10. The defendants contend that in consequence of the non-registration under the Bills of Sale Act of the indenture of mortgage, the machinery, plant, and fixtures are liable to be seized under the writ of *fi. fa.*

11. The question for the opinion of the court is whether the plaintiffs are entitled under the indenture of mortgage to the fixed *machinery, plant, and fixtures, or whether the de- [292] fendants are entitled to seize them under the writ of *fi. fa.*

Pearce, for the plaintiffs. This case is concluded by *Holland v. Hodgson* ⁽¹⁾, in which all the authorities bearing on the question are cited. The court then called on

Edward Wilberforce for the defendants. *Holland v. Hodgson* ⁽¹⁾ is distinguishable. In that case the mortgage was in fee with the fixtures attached: the present deed demises the premises by way of underlease, and contains a separate conveyance of the fixtures. This point was adverted to in the judgment of the court in *Holland v. Hodgson* ⁽²⁾, but as it was unnecessary to the determination of that case, no opinion was pronounced. The court there remark: "If a tenant having only a limited interest in the land and an absolute interest in the fixtures were to convey not only his limited interest in the land, and his right to enjoy the fixtures during the term, so long as they continued a part of the land, but also his power to sever those fixtures and dispose of them absolutely, a very different question would have to be considered. As it does not arise, we decide nothing as to this. We are not to be understood as expressing dissent from what appears to have been the opinion of Wood, V.C., in *Boyd v. Shorrock* ⁽³⁾, but merely as guarding against being sup-

⁽¹⁾ Law Rep., 7 C. P., 328.

⁽²⁾ Law Rep., 5 Eq., 72.

⁽³⁾ Law Rep., 7 C. P. at p. 334.

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Hawtry v Butlin.

posed to confirm it." It is difficult to understand *Boyd v. Shorrock* (¹), and Malins, V.C., in *Begbie v. Fenwick* (²) dissents from that decision. The facts in the latter case were that one Stewart mortgaged certain leaseholds for a term of years by way of underlease to one Begbie, and, by a second operative part of the same deed, also assigned certain trade fixtures to the mortgagee. This deed was not registered under the Bills of Sale Act. Shortly afterwards, Stewart executed a second deed similar to the first, to one Fenwick, who caused the deed to be registered. Stewart became bankrupt, and the question arose whether the deed to Begbie did not require registration as a bill of sale. Malins, V.C., held that it did. The above facts are similar to those in the present case. Malins, V.C., in his judgment states that he [293] does not understand the grounds of *Wood's, V.C., decision in *Boyd v. Shorrock* (¹), and he decided directly contrary to the authority of that case.

Pearce, in reply. *Boyd v. Shorrock* (¹) is in point, and is supported by *Mather v. Fraser* (³), and *Longbotham v. Berry* (⁴).

BLACKBURN, J. In this case our judgment must be in favor of the defendants, on the ground that the deed is a bill of sale of fixtures and is not registered. The first section of the Bills of Sale Act requires a bill of sale of personal chattels to be registered, and the interpretation clause includes fixtures within the meaning of the term "personal chattels." Without the interpretation clause chattels attached to land, which a tenant has a right to remove, would not be within the first section; but the object of the statute is to protect assignees in bankruptcy and creditors, and therefore fixtures which a tenant may remove are brought within the operation of the enactment. *Holland v. Hodgson* (⁵), and *Mather v. Fraser* (³) show that where land is mortgaged in fee, with fixtures attached, such as a tenant for years, if the land were leased, might remove at the determination of his lease, the fixtures pass with the conveyance of the land, because upon the mortgage in fee they are to be deemed part of the land. But when a person has a limited interest in land such as a term of years, and on the land there are fixtures in which he has an absolute property, and he mortgages his interest in the land by way of under lease, I should think that the property in the fixtures would not pass by the mortgage, and the right to sever them would still remain in the mortgagor, unless there is a clear intention, to be gathered from the terms of the mortgage deed, to convey the absolute interest in the fixtures as well as the limited interest in the land. If the mortgagor intended as

(¹) Law Rep., 5 Eq., 72.

(²) 24 L. T. (N.S.), 58.

(³) 2 K. & J., 536; 25 L. J. (Ch.), 361.

(⁴) Law Rep., 5 Q. B., 123.

(⁵) Law Rep., 7 C. P., 828.

an additional security to convey his right to sever the fixtures, I should think, if the matter were *res integra*, that the conveyance of the fixtures must be treated as a bill of sale of personal chattels, and would require registration. There is, however, a decision to the contrary: for in *Boyd v. Shorrocks* ⁽¹⁾, certain persons were tenants for years of a mill, and owners of certain trade fixtures therein; they mortgaged the mill and the *trade [294 fixtures, but the assignment was not registered as a bill of sale; and Wood, V.C., held, that the fixtures passed to the mortgagee without registration. I agree with Malins, V.C., in *Begbie v. Fenwick* ⁽²⁾ that it is difficult to understand the grounds on which Wood, V.C., arrived at that conclusion. If *Boyd v. Shorrocks* ⁽¹⁾, stood alone, I should wish to take time to consider this case, but *Begbie v. Fenwick* ⁽²⁾ is a conflicting authority, and was decided by a court of coordinate jurisdiction. We have, therefore, two authorities of equal weight opposed to each other, and I prefer to follow the later decision. I give my judgment for the defendants on the ground that, as the deed conveyed an absolute right to the fixtures, it was a bill of sale and required registration.

MELLOR, J. I am of the same opinion. I think the policy of the Bills of Sale Act is carried out by the decision at which we have arrived. By the interpretation clause it is quite clear that a bill of sale of fixtures must be registered. It is expressly found that the assignment was of trade fixtures, and if they alone were assigned as a security for the debt the deed of conveyance would have to be registered. It cannot make any difference that the deed conveys something else of a different nature, viz., a term of years. I think, therefore, that the assignment of fixtures is within the policy of the act, and it is within the express words of the interpretation clause. In *Boyd v. Shorrocks* ⁽¹⁾, the attention of Wood, V.C., does not seem to have been called to the interpretation clause. With all respect to the decision of Wood, V.C., I prefer the later decision of Malins, V.C., which seems to me based on a more correct view of the law. I come, therefore, to the conclusion that this deed requires registration and that our judgment ought to be given in favor of the defendants.

LUSH, J. The question is whether this mortgage deed is a bill of sale of personal chattels which requires registration. The term personal chattels is defined in the interpretation clause of the Bills of Sale Act to comprehend fixtures. Where a conveyance is made of a manufactory in fee or for a term of years, that cannot be said to be a bill of sale of chattels although machinery may pass as part *of the factory. The deed being [295 a conveyance of the land does not require to be registered, although the machinery passes with it. That is not the case

⁽¹⁾ Law Rep., 5 Eq., 72.

⁽²⁾ 24 L. T. (N. S.), 58.

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here. The mortgage is a demise by way of underlease, and if that were all, the lessee would have been entitled to the use of the fixtures only for the term, but the deed assigns an absolute property in the fixtures to the mortgagee, and that part of the deed is, therefore, a bill of sale of personal chattels. I adopt the decision of Malins, V. C., as being the sounder decision.

Judgment for the defendants.

Attorney for plaintiffs: *Steinberg.*

Attorney for defendants: *J. W. Sykes.*

A mortgage upon real estate which also covers looms and other personal property must be filed in the town clerk's office as a chattel mortgage. *Murdock v. Gifford*, 18 N.Y., 28.

So upon the rolling stock of a railroad company. *Stevens v. The Buffalo, etc.*, 81 Barb., 590; *Beardsley v. Ontario Bank*, 81 Barb., 619; but see *Bement v. Plattsburgh Railroad Company*, 47 Barb., 104.

In New York, the question as to the rolling stock of a railway company is set at rest by a statute providing that it shall be sufficient to record the mortgage in the county clerk's office as a mortgage upon real estate. 2 Laws 1868, p. 1747.

[Law Reports, 8 Queen's Bench, 295.]

April 23, 1873.

BURTON, Appellant; EYDEN, Respondent

Friendly Society — "Sickness" — Insanity.

By the rules of a friendly society, after payment of a year's subscription, "any member shall receive 8s. per week during any sickness or accident that may befall him, unless by rioting or drunkenness."

Held, that insanity was "sickness" within the meaning of the society's rules

CASE stated by justices of Northamptonshire under 20 & 21 Vict. c. 43.

An information was preferred by the appellant (as parent and next friend of Samuel Burton, a member of the Stoke Bruern Friendly Society), against the respondent, as secretary of the society, for that Samuel Burton, a member of the society, was then insane and an inmate of the Northampton General Lunatic Asylum, and, as such, sick and entitled to relief from the society, which relief has been refused to him.

At the hearing, on the 2d of July, 1871, a copy of the rules was put in, of which the following are material:

On the first page was the preamble:

"Whereas it is a laudable custom in Great Britain for divers artists and other disposed persons to meet and form themselves into societies for the relief of such members as by illness or accident shall not be able to work at their usual employment: It is therefore agreed by us, who have entered our names in a book and subscribed, as follows:

" Rule 11. That if any member remove from his present place of abode to any part of England, he shall be allowed two months to send his contribution [296 money in, or forfeit 1s. 6d., but if he neglect to send it in three months he shall be excluded. And if the person absent shall duly send his contribution, and be there taken sick and unable to work at his trade, he shall send a certificate signed by the minister, churchwarden, and doctor of the parish where he resides, certifying how long he hath been ill, and what his disorder is. But if such member's illness shall continue for more than a month, he shall send a certificate every month as above, and on the receipt of such certificate he shall receive his money the same as if he were present.

Rule 12. If any member that hath been sick and received contribution of this society, be seen by another member or any other creditable person (after his report and before he hath declared to the stewards that he will be no more from that time chargeable to the society) to work at his trade or any other business from which he may receive any profit, he shall not only be denied the benefit of the society, but be excluded. If any member shall frequent places of gaming when he is on the box he shall be excluded.

Rule 13. That no member shall be entitled to any benefit from this society till one year be expired from the day of his entrance, and all his contributions, &c., to that time be cleared off; he shall then receive 8s. per week during any sickness or accident that may befall him, unless by rioting or drunkenness (the venereal disease excepted), which shall be carried to him by the stewards weekly; who are required to visit and inquire after the state of the sick, for which they shall receive 3d. per mile from the box for their trouble, and accordingly make their report to this society; in case of failure, to forfeit for each offense 1s. 6d.

Rule 24. It is agreed by this society that no member shall receive any benefit from this society while he is voluntarily inoculated from the small pox, nor shall any person be admitted a member who hath any bodily infirmity upon him, except in such cases as may appear to the society to be noways likely to affect the box, and may be approved of by a majority of the members; but if any person be afflicted with any invisible disorder, and clandestinely enters this society as a sound member, he shall, when found out, be excluded.

Rule 28. That when any member falls sick he shall send a written report to the stewards, and the sick member shall send for the doctor, and if the doctor neglects to visit such member for the space of one day from the report given in by the stewards, he shall forfeit the sum of 2s. 6d.

Rule 32. That if any member shall by quarreling, fighting, wrestling, or any other unlawful or needless exercise, fall into either sickness, lameness, or blindness, &c., he shall not be allowed the benefit of this society.

Rule 44. In cases of dispute between this society and any member or person claiming on account of a member, reference shall be made to justices pursuant to 10 Geo. 4, c. 56, ss. 27, 28 ⁽¹⁾.

Samuel Burton was and is a member of the society. He declared *upon the sick fund of the society by sending a [297 certificate to the trustees signed by James Parsons Knott of Blisworth, the usual medical officer of the society, as follows: " April 30, 1872. This certifies that Samuel Burton is unable to follow his employment from general weakness and a disease of the mind."

Burton was shortly after the date of the certificate confined as a lunatic at the Northampton county lunatic asylum, where he still remains confined as a lunatic.

⁽¹⁾ The 10 Geo. 4, c. 56, is repealed by 18 & 19 Vict. c. 63, s. 1, and sch. 1; but by 21 & 22 Vict. c. 161, s. 5, where the rules of any society, established under 18 & 19 Vict. c. 63, or any of the

acts thereby repealed, shall direct disputes to be referred to justices, the proceeding is to be by complaint and summons, to be determined as under 11 & 12 Vict. c. 43.

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Burton has not by himself or his friends received any pecuniary aid from the society, and the society have refused to make any such payment.

It was admitted that all proper notices of illness had been sent on behalf of Burton to the society.

The justices, being of opinion that insanity was not a sickness which entitled the members to relief from the society under its rules, dismissed the summons.

The question for the court was, whether the above facts justified a dismissal of the summons or not.

Metcalf, Q.C., for the appellant, contended that insanity was sickness within the rules of the society. He referred to rules 11 and 13, and cited *Reg. v. Manchester*.⁽¹⁾

[QUAIN, J., referred to the preamble of the rules.]

The court called upon

Edmund Thomas, for the respondent. He referred to the terms of the Act 18 & 19 Vict. c. 63, s. 9, subs. 2, "old age, or widowhood;" and cited *Reg. v. Huddersfield* ⁽²⁾. In *Reg. v. Manchester* ⁽¹⁾, and *Hunslet v. Dewsbury* ⁽³⁾, lunacy was assumed by the court not to be sickness.

BLACKBURN, J. I am of opinion that lunacy is sickness within the meaning of the rules of this society. If we look at the terms of the acts ⁽⁴⁾, they speak of sickness, old age, and widowhood, and it is quite clear that mere temporary sickness is not what is contemplated; and I see nothing in the rules themselves that confines the relief to temporary illness; and rule 11 shows 298] that "the society contemplated relief at all events that would not be temporary, but might last over months.

Insanity depends on the state of mind and body of the person. The poor law cases proceeded on acts passed with a different object from that of friendly societies, by which it was enacted that a pauper should not be removed if his chargeability were owing to such sickness or accident as would *prima facie* be only temporary; and the question arose whether insanity came within the meaning of sickness for this purpose, but no absolute decision has been come to, though it seems to have been assumed that lunacy was sickness. It certainly seems to me that lunacy is a sickness affecting the health of the body in such a way as to prevent a man's ability of earning his livelihood. If it were not the intention to include it, the rules of the society should be framed so as expressly to exclude it.

⁽¹⁾ 6 E. & B., 919; 26 L. J. (M.C.), 1.

⁽²⁾ 26 L. J. (M.C.), 3 (n.).

⁽³⁾ 7 E. B., 794, at p. 798; 26 L. J. (M.C.), 169.

⁽⁴⁾ See 10 Geo. 4, c. 56, s. 2; and 18 & 19 Vict. c. 63 s. 9, subs. 2.

QUAIN, J. I am also of opinion that insanity is sickness within the society's rules. The preamble of the rules is wide enough to include it; the words of rule 13, entitling the member to relief, are "during any sickness or accident," except certain excluded cases, insanity not being one. There is nothing to show that temporary illness only was contemplated; and if we look at rule 32, that seems to show that blindness was intended in general to be included, as it exempts it in particular cases, and blindness is certainly not temporary in most cases.

ARCHIBALD, J., concurred.

Case remitted to the justices accordingly.

Attorney for appellant: *R. Metcalf for Whitton, Towcester.*

Attorney for respondent: *Franklin, for Greville & Franklin, Towcester.*

(Law Reports, 8 Queen's Bench, 302).

April 30, 1873.

*GREGG, Appellant; SMITH, Respondent.

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Pedlars Act, 1871 (34 & 35 Vict. c. 96), ss. 3, 4—"Pedlar."

Twelve ladies, of whom respondent was one, having purchased materials and made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket, called a missionary basket, from house to house for sale. The ladies did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, and the profits of the sales were devoted to a village school and religious purposes:

Held, that the respondent did not come within the definition of a "pedlar" in s. 3 of the Pedlars Act, 1871, and was not liable under s. 4 to a penalty for acting as a pedlar without a certificate.

CASE stated by justices of the parts of Lindsey, in the county of Lincoln, under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, superintendent of police, against the respondent under s. 4 of the Pedlars Act, 1871 (34 & 35 Vict. c. 96), charging that she, on the 26th of August, 1872, unlawfully did act as a pedlar without having obtained a certificate under the said act.

Upon the hearing it was proved and admitted on the part of the appellant and respondent and found as a fact, that twelve ladies, of whom the respondent was one, purchased materials and made them into aprons, handkerchiefs, chemises, shoes, and other articles of wearing apparel; and also wool mats and other articles for domestic use. These articles were carried about in a basket called a missionary basket from house to house for sale by the twelve ladies, each having the basket one month.

The respondent on the day mentioned in the information went on foot to "other men's houses" with the basket and exposed

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for sale and sold some of the articles named above, and had no certificate authorizing her to act as a pedlar under the act.

The twelve ladies do not find the money for the materials out of which to make the articles, but the money derived from the sales is applied toward the purchase of them. The profits of the basket are devoted to a school in the village of Laceby and religious purposes, but 10% of the profits was once given towards furnishing a minister's house.

It is also an admitted fact that under the Pedlars Act of 1870 303] *each of the twelve ladies took out a pedlar's certificate, the fee for which was 6d., but now they do not, as, under the Pedlars Act, 1871, the fee for the certificate is 5s.

It was contended on the part of the respondent that the respondent did not come within the meaning of the term "pedlar" mentioned in the 1st clause of the 3d sect. of the Pedlars Act, 1871, as she did not go about as a trader to sell for her own personal gain or profit, or as a means of livelihood, but simply for a charitable and religious purpose which was not within the spirit or contemplation of the act.

On the part of the appellant it was contended that the respondent was a pedlar within the meaning of the act, and that she was not one of those persons defined by the 23d sect. who do not require certificates, and that if the legislature had intended to exempt such cases as the going about from house to house and selling for charitable or religious purposes it would have defined them in the 23d sect.

The justices, having considerable doubt whether the respondent was a pedlar within the interpretation of the term "pedlar" mentioned in the 3d section of the act, so as to bring her within the operation of the 4th section, dismissed the information (¹).

The question for the court was whether the respondent was a "pedlar" within the meaning of the act, and liable to the penalties under the 4th sect.

Cave, for the appellant, contended that the respondent came within the definition of a pedlar given in s. 3 of 34 & 35 Vict. c. 96 (¹), and cited *Rex v. M' Gill* (²); *Attorney General v. Tongue* (³). 304] * *Waddy*, for the respondent, was not heard.

(¹) 34 & 35 Vict. c. 96, s. 3: "The term 'pedlar' means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without a horse or other beast bearing or drawing for him, travels and trades on foot, and goes from town to town or to other men's houses, carrying to sell, or exposing for sale, any goods, wares, or merchandise, or procuring orders for goods,

wares, or merchandise immediately to be delivered, or selling, or offering for sale his skill in handicraft."

Sect. 4: "No person shall act as a pedlar without such certificate as in this act mentioned" . . . under a penalty not exceeding 10s. for the first and 1l. for any subsequent offense.

(²) 3 B & C., 143.

(³) 12 Price, 51.

BLACKBURN, J. It is quite clear that these ladies do not come within the mischief of the act, and it is equally clear that they do not come within the definition of pedlar in s. 3. The definition says that person is a pedlar who travels and trades on foot. The act talks of the person licensed carrying on the trade of a pedlar. It is impossible to say that the chief officer of police, who is to grant these certificates under s. 5, subs. 1, could be satisfied that these ladies "in good faith intended to carry on the trade of a pedlar." Again, the form of application for a pedlar's certificate is given in the second schedule, and on it the person applying is to state his trade and occupation, e. g., that he is a hawker, pedlar, &c. How is it possible for these ladies so to describe themselves? To say, therefore, that these ladies act as pedlars would be an abuse of language and common sense.

QUAIN, J. There is a definition of pedlar in the act, but that includes in it one who "trades," and there is no definition of "trader" or "trading," we must therefore fall back on the ordinary meaning of that word; and I find this in Lee's Bankruptcy, p. 488: "Whether or not a person is a trader does not depend upon his occasionally doing acts of trading, but upon the intention generally so to get his living." That certainly will not include these ladies.

ARCHIBALD, J., concurred.

Judgment for the respondent.

Attorneys for appellant: *Swann & Co.*

Attorneys for respondent: *Grange & Wintringham, Grimsby.*

[Law Reports, 8 Queen's Bench, 308.]

April 30, 1873.

***THE TRUSTEES OF MARKET HARBOROUGH AND BRAMPTON [308
TURNPIKE TRUSTS, Appellants; THE KETTERING HIGHWAY
BOARD, Respondents.**

Highway Turnpike—Application of Turnpike Tolls under Local Act, 4 Vict. c. xxxv.—Contribution under 4 & 5 Vict. c. 59.

A Turnpike Act, 4 Vict. c. xxxv., after reciting that the principal sum borrowed on the credit of the tolls under former acts still remained unpaid, together with arrears of interest thereon, and that such sums cannot be paid, nor the interest thereon discharged, nor the road kept in repair, without further powers by s. 18 enacted that all moneys received by the trustees "shall be applied in the first place in paying and discharging any interest which may from time to time be owing in respect of any money borrowed on the credit of the tolls; secondly, in maintaining and keeping the roads in repair; and thirdly, in reducing and paying

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off the principal sums borrowed." On an application under 4 & 5 Vict. c. 59, for an order for contribution from the highway rates:

Held, that the act did not authorize the payment of arrears of interest before repairing the road; By Blackburn and Archibald, JJ.; Quain, J., doubting.

Case stated by justices of Northamptonshire under 20 & 21 Vict., c. 43.

An information was exhibited by the clerk to the trustees of the Market Harborough and Brampton Turnpike Trust under 4 & 5 Vict. c. 59 (continued by 34 & 35 Vict., c. 95) that the funds of the trust were insufficient for repair of the road within eight several parishes in the Kettering highway district, and praying for an order of contribution.

The justices examined the state of the revenues and debts of the trust, and the condition of repairs, length of roads, &c., when it appeared that a sum of 1115*l.* 10*s.* 2*d.* was due for arrears of interest owing in respect of money borrowed on credit of the tolls up to the 6th of April, 1871, that a further sum of 524*l.* 14*s.* 9*d.* was due for the year's interest to the 6th of April, 1872, and that the interest from that date to the end of the year 1872 (the rate being reduced to 2 per cent by a provisional order) would be 187*l.* 1*s.* 2*d.* It further appeared that the income for the current year exceeded the estimated expenditure,—including in such expenditure the year's interest from the 31st of December, 1871, to the 31st of December, 1872,—but the trustees proposed to pay out of the present year's income a sum of 309*l.* 8*s.* 12*d.* for *arrears of interest due prior to the 31st of December, 1871, after payment of which a deficiency of upwards of 800*l.* was shown for the present year.

The estimated expenses of repairing the road for the current year were 1100*l.*, and of putting the act into execution, 205*l.* 10*s.*

The Local Act (4 Vict. c. xxxv.), s. 1, after reciting certain previous acts, and that considerable sums of money have been advanced upon the credit of the tolls authorized to be taken by those acts, "which money still remains owing, together with an arrear of interest thereon, and such money cannot be paid off, or the interest thereof discharged, nor can the said road be effectually improved and kept in repair, unless further powers are granted," repealed the former acts; and by s. 18 enacted that all moneys which shall be received by the trustees "shall be applied in the first place, after payment of the expenses of obtaining and passing this act, in paying and discharging any interest which may from time to time be owing in respect of any money which may have been borrowed on the credit of the tolls authorized to be taken by the said recited acts hereby repealed; secondly, in defraying the expenses of improving, maintaining,

and keeping in repair such road, and in putting the act into execution with reference thereto; and thirdly, in reducing, paying off, and discharging the several principal sums which have been borrowed on the credit of the tolls. . . ."

It was contended, on the part of the highway board, that the direction contained in the above clause for payment, in the first place, of any interest which might from time to time be owing in respect of any money borrowed on credit of the tolls, rendered it obligatory on the trustees to pay the interest from year to year out of the current year's income, and that in default of so doing they were not at liberty to apply the income of 1872 in payment of arrears of interest in priority to the current expenses of maintaining the road. Special attention was drawn to the fact that if the funds of the trust during the present year should be rendered deficient by payment out of the year's income of the arrear of interest of former years the burden would fall upon the district fund of the highway board, under the act passed last session (34 & 35 Vict. c. 115, s. 15) instead of upon the rates of the *several parishes through which the road passes, upon [310] which it would have fallen had any deficiency been occasioned in former years by reason of the payment of the interest from year to year, as it became due.

The case of *Bruton v. Wincanton* (1) was cited in favor of an order being made, and the case of *Reg. v. Hutchinson* (2) was cited *contra*.

The justices dismissed the information, on the ground that the arrears of interest ought to have been paid out of the income of former years, in which case the funds of the trust would not have been deficient for the present year's expenditure; and that the trustees, having allowed the interest to fall into arrear, contrary to the provision contained in the application clause, were not at liberty to apply the income of 1872 in payment of arrears of interest in priority to the current expenses of maintaining the road.

Manisty, Q.C. (with him *Speke*), for the appellants, contended that the object of the act was to pay all interest, whether annual or in arrear, in preference to anything else; and relied on *Bruton v. Wincanton* (1). *Reg. v. Hutchinson* (2) would be relied on by the respondents; but there was no recital in the act there in question that there were arrears of interest; whereas here one of the express objects appearing in the recital was to get rid of arrears of interest.

Cave, for the respondents, contended that it was *prima facie* contrary to the policy of the legislature to charge bygone debts on the annual income. Interest, in s. 18, must therefore mean

(1) Law Rep., 5 Q. B., 437.

(2) 4 E. & B., 200; 24 L. J. (M.C.), 25.

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the annual interest; and the arrears of interest must take rank with the principal. He referred to *Reg. v. South Shields* ⁽¹⁾.

Manisty, Q.C., in reply, contended that the construction of the respondents left arrears of interest out of the act altogether.

[QUAIN, J. The recital of the act is strong to show that the paying off of the arrears of interest was one of the express objects of the act.]

The judges having retired, on their return into court,
 311] *BLACKBURN, J. I am of opinion that the justices were right, and that their decision must be affirmed. The question turns entirely upon the construction which is to be put upon the appropriation clause in this act; whether, not only the annual interest, but arrears also may be paid previous to the repairs. There have been some cases before on this subject, but they turned on different forms of words from the present. In *Reg. v. Hutchinson* ⁽²⁾ it was held that the phrase, "keeping down the interest," meant paying the annual interest, and did not include paying arrears of interest, and consequently the trustees had no power to appropriate the annual funds to the arrears before providing for the repairs. In *Bruton v. Wincanton* ⁽³⁾ the form of words was, "in paying and discharging all interest now due and owing and which shall hereafter become due," and it was held that the trustees were at liberty to apply the tolls in payment of arrears of interest in priority to the repairs of the road. On consideration, I am of opinion that in the present case the appropriation clause (s. 18) does not authorize the payment of more than the annual interest in priority to the repairs. [The learned judge read the preamble and s. 18 of 4 & 5 Vict. c. xxxv.] It is said that the preamble shows that the existence of arrears had been brought to the notice of the legislature, and that s. 18 ought to be construed accordingly. But the expression in s. 18, is "in paying and discharging any interest which may from time to time be owing," and it does not in terms say what is to be done about the arrears; and we have to consider whether arrears are included in the above terms. The effect of construing the terms only to include the annual interest will be that the annual expenses will be the first charge on the annual funds, and would throw, in fact, on the ratepayers of a particular year only any deficit after paying the annual charges; whereas, if the interest be allowed to accumulate, and if it be then allowed to take priority of the repairs, the effect is to throw on a subsequent set of ratepayers what ought to have been borne by their predecessors. This is contrary to the general rule of law that you cannot charge or make rates for bygone

⁽¹⁾ 8 E. & B., 599; 23 L. J. (M.C.), 194.

⁽²⁾ 4 E. & B., 300; 24 L. J. (M. C.) 25. ⁽³⁾ Law Rep. 5 Q. B., 437

debts; this, no doubt, has been lately modified, but *prima facie* that it is still what any particular enactment must be taken to have intended. Now here *bygone arrears are not expressly provided for; and therefore they, like any other debts, must be met when there is a surplus of the fund not otherwise appropriated. That there are arrears is as much the fault of the creditors as of the trustees. Were it not for the recital in the present statute, this case would be like that of *Reg. v. Hutchinson* (!); for the expression, "keeping down the interest," does not seem materially different from "paying and discharging any interest which may from time to time be owing." The fact of the arrears being mentioned in the recital affords an argument, no doubt, in favor of the other construction, but it does not appear to me sufficient to lead me to that conclusion. The annual fund from the tolls must, therefore, be applied in the first instance to the annual interest only, and the arrears of interest must come in after the repairs; and consequently the funds were sufficient, and the justices were right in refusing the order.

ARCHIBALD, J., concurred.

QUAIN, J. I entertain some doubt whether the trustees are not entitled to an order in this case. I think s. 18 and the recital in the act must be construed together. The recital expressly refers to the arrear of interest then due, and says that such interest cannot be discharged unless further powers are granted. It seems to me that s. 18 should be construed as referring to the same interest already mentioned in the recital, and therefore as extending to the arrears of interest as well as to the interest of the current year.

Judgment for the respondents (*).

Attorneys for appellants: *Milne, Riddle & Mellor*.

Attorneys for respondents: *Ware & Hawes*.

(*) Law Rep., 4 E. & B., 200; 24 L. J. (M. C.), 25.

(*) See the next case.

C A S E S
DETERMINED BY THE
COURT OF COMMON PLEAS,
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,
IN AND AFTER
HILARY TERM, XXXVI VICTORIA.

[Law Reports, 8 Common Pleas, 181.]

Nov. 28, 1872.

191.] ***[IN THE EXCHEQUER CHAMBER.]**

MCCARTHY v. THE METROPOLITAN BOARD OF WORKS.

Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68 — Compensation for Lands Injuriouſly affected — Obſtruction of Highway.

The plaintiff was the occupier, under a lease for a long term, of premises in the city of London, where he carried on the business of a carman and contractor. Adjacent to these premises, but not actually touching them, a public highway being between, was a public-draw dock communicating with the river Thames. The plaintiff had no right or easement to or in the dock other than his right as one of the public, but the plaintiff's premises, by reason of their proximity to the dock, and the access given thereby to and from the river, were rendered more valuable either to sell or occupy, with reference to the uses to which any owner might put them.

The Metropolitan Board of Works, in constructing the Thames Embankment under the powers conferred upon them by the Thames Embankment Act, 1862 (25 & 26 Vict. c. 93), which incorporates the Lands Clauses Consolidation Act, 1845, filled up the dock, and so cut off the access from the river to the public street adjoining the plaintiff's premises, which thereby became, as premises either to sell or occupy in their then state, and with reference to the uses to which any owner or occupier might put them, permanently diminished in value:

Held (by Kelly, C.B., Blackburn, J., Archibald, J., and Bramwell, B., Cleasby, B., dissenting, affirming the judgment of the court below), that the plaintiff's interest in the premises was injuriously affected within the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 68, so as to entitle him to compensation.

Ricket v. Metropolitan Ry. Co. (Law Rep., 2 H. L., 175) and *Chamberlain v. West End of London, &c., Ry. Co.* (2 B. & S., 605, 617; 31 L. J. (Q. B.), 201; 32 L. J. (Q. B.), 173), discussed.

Error from the judgment of the Court of Common Pleas on a special case reported, Law Rep., 7 C. P., 508, where the facts are fully stated.

Hawkins, Q.C. (*Philbrick* with him), for the defendants.

Prentice, Q.C. (*Thesiger* with him), for the plaintiff.

The arguments were substantially the same as in the court below, and may be sufficiently gathered from the judgments.

The following cases were referred to in addition to those cited in the court below and referred to in the judgments: *London* and North Western Ry. Co. v. Smith* (1); *Moore v. Great [192 Southern and Western Ry. Co. (2); Tuohey v. Great Southern and Western Ry. Co. (3).* Cur. adv. vult.

Feb. 7. The following judgments were delivered:

CLEASBY, B. The question in this case is, whether the plaintiff is entitled to compensation, under the 68th section of the Lands Clauses Consolidation Act, by reason of his premises being injuriously affected by the Thames Embankment made by the defendants. I understand that all my learned brothers think the plaintiff is so entitled (I regret that I cannot agree with them), because the plaintiff appears to have suffered in his trade considerable damage from losing the use of the river. But it appears to me that the case is not brought within the words of the act of parliament, nor within the construction which they have received in the courts and in the house of lords. If the plaintiff is entitled, I cannot see how any person occupying premises in a street communicating with the river, who, for the purposes of his occupation, made use of the river—a person, for instance, who had a coal-yard and who had barges brought up there, or a builder having premises contiguous to the new courts of law and engaged in some contract there—would not have a similar claim, for he could undoubtedly show that his premises were increased in value by the use of the river. And the multiplicity of claims which this would give rise to is strongly pointed out by Lord Cranworth in *Ricket v. Metropolitan Ry. Co.* (4) as a good reason for not extending the meaning of the words. The present case, as well as that of others using the river, might have been made the subject of special provision for compensation, limiting the right within certain limits and under certain conditions; but under the general act such cases are not provided for.

The plaintiff was the occupier of certain premises at Whitefriars, of which he had a long lease, and where he carried on an extensive business in bricks and other building materials.

(1) 1 Mac. & G., 216; 19 L. J. (Ch.), 192.

(2) 10 Ir., C. L., 46.

(3) 10 Ir. C. L., 98.

(4) Law Rep., 2 H. L., 175.

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The premises were situated at the distance of about 350 feet [193] *from the general line of the river Thames, with other premises between them and the river. There was, however, a dock projecting from the river into the land for the distance of 352 feet, as shown on the plan which forms part of the case, and the extremity of this reached to within about 25 feet of the corner of the plaintiff's premises as appears by the scale at the bottom of the plan. The premises, therefore, do not adjoin the river or adjoin the dock so as to give the plaintiff any of the rights of a riparian proprietor.

The case finds (paragraph 4) "the plaintiff had no right or easement to or in the draw-dock other than as one of the public, nor was there appurtenant or otherwise belonging to the plaintiff's premises any easement, right, or privilege in or to the said dock." It appears to me that if the present question was now raised for the first time, the finding referred to would be conclusive against the present claim. For I do not see how premises can be injuriously affected unless there is some damage to the premises themselves, or to some right belonging to them. The premises themselves would be injuriously affected if there was any structural damage by reason of the execution of the works, as if (not to mention other instances) floods were brought upon them which made them unfit for occupation, whether buildings or land: and the premises would be injuriously affected by loss of or damage to some right belonging to them in various ways. As for example if they were waterside premises, and entitled to the flow of a river, and it was taken away as in the *Duke of Buccleuch's Case* (¹), or if right to light and air, or private right of way or any similar right belonging to the premises were interfered with, of which the instances are numerous. Another instance may be mentioned, viz., if the premises adjoined a public highway, and in constructing some works, a bridge for instance, either to carry a railway over a public road or to carry the road over it, the level of the highway was altered — it might be several feet or it might be much less — in such a case the alteration of the level might be a damage to the premises. The public in general might be benefited by having a more level and convenient road, and the person occupying the premises might, as one of the public, share this benefit, but he would have a particular right an- [194] nexed to his premises of having *a certain access from them to the highway, and if this was prejudiced (which would be a question of fact) he would have a right to compensation. The general act of parliament does not give compensation to all persons whose premises are rendered less valuable for occu-

(¹) Law Rep., 5 H. L., 418.

pation in respect of their calling or trade carried on there in respect of general convenience, but only where the premises themselves are injuriously affected, and injuriously affected by the execution of the works. The premises themselves must be taken or injuriously affected by the execution of the works to give a right to compensation. The words "by the execution of the works," point as it appears to me to the direct effect produced upon the premises by the works, the effect of a contiguous cutting on the fabric, of an embankment upon the light, and so on. This foundation of a particular right interfered with places a limit to claims which would be almost unlimited if every diminution of value was to be sufficient. And as the only reason for the execution of the works by compulsory powers is that they are a great public benefit, any injury which a person suffers in common with the rest of the public may be regarded as compensated for by the benefit. And there is this further objection to reading the words as signifying a mere deterioration of value, that (independently of this being a matter of opinion) the test of the right to compensation would be fluctuating and uncertain, inasmuch as at one time the premises might appear to be diminished in value, at another—six months afterwards—they might appear to be increased, and then the title to compensation would depend upon when the claim was made. But although the reasons already given would have been sufficient, independent of authority, to satisfy me that in the present case the plaintiff was not entitled to compensation; yet, as similar questions have already arisen and been the subject of decision in all the courts and houses of lords, and especially as the opinion which I have expressed is at variance with that of the court below, it is proper to consider the effect of these decisions, and to show that the conclusion arrived at is in entire conformity with what they established. The words "injuriously affected" in the Lands Clauses Consolidation Act received a construction by the Court of Queen's Bench in the case of *Re Penny* (¹).

*The words of Lord Campbell are: "The test is whether, [195 before the railway act authorizing the company to do what has been done here, an action would have lain at common law for what has been done and for which compensation has been claimed? If it would, and that act is authorized by the railway act, compensation may be claimed in respect of it; if the land is not taken, and nothing is done which would have afforded a cause of action before the act passed, then, although it may produce a deterioration of the property, it does not injuriously affect the land or constitute a ground for compensation." The

(¹) 7 E. & B., 660: 26 L. J. (Q.B.), 225.

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other judges — Wightman, Erle, and Crompton, JJ.— lay down the same rule in almost the same words. It is taken from the opinion of Lord Cranworth in the house of lords in the case of *Caledonian Ry. Co. v. Ogilvy* ⁽¹⁾, assented to by Lord St. Leonards, which is the real foundation of the rule since adopted by all the courts in dealing with cases of that description. It is unnecessary to refer to all the authorities; but as Mr. Justice Willes was one of the judges from whose judgment the present case is an appeal, I may quote his words in *Beckett v. Midland Ry. Co.* ⁽²⁾: “To entitle a claimant to compensation under the Lands Clauses Consolidation Act, 1845, two things must concur, viz., that he has sustained a particular damage from the execution by the company of the works authorized by the special act, and that the damage was one for which he might have maintained an action if the work was not authorized by parliament.” The rule was adhered to and acted on by the house of lords in *Rickett v. Metropolitan Ry. Co.* ⁽³⁾. It is true, that in that case Lord Westbury states his opinion to the contrary, and would extend the meaning of the words “injuriously affected” by making them include any damage sustained by the occupier in connection with his occupation; but if that opinion had been adopted, the decision of the house of lords must have been different, and therefore it must be considered as rejected by the highest tribunal, and by that we are bound. This test is really the same as that which has been put already in different words, viz., that where there is no injury to the premises themselves, nor [196] *to any rights connected with them, there is no claim to compensation, as there can only be an action where there is an injury to a right. In the present case, according to the statement in par. 4, there is no injury to the premises, nor to any right belonging to them, nor any damage of a different nature from that which would be sustained by any of the public using the dock regularly or occasionally; and when that is the case, the redress for the obstruction to a navigable river or highway is by indictment, and not by action; *Reg. v. Bristol Dock Co.* ⁽⁴⁾; *Winterbottom v. Lord Derby* ⁽⁵⁾. It is true, a person injured may remove the obstruction so far as is necessary to enjoy his rights: *Mayor of Colchester v. Brooke* ⁽⁶⁾; but he would do this, not as owner or occupier of particular premises, because he does not enjoy the right in that character, but as one of the public.

The plaintiff besides his right as one of the public to pass along the street in front of his premises, has also the right belonging to his premises to pass from them to that street not al-

(1) 2 Macq., 229.

(2) Law Rep., 3 C. P., at p. 94.

(3) Law Rep., 2 H. L., 175.

(4) 12 East, 429.

(5) Law Rep., 2 Ex., 316.

(6) 7 Q.B., 379; 15 L.J. (Q.B.), 173.

tered or interfered with except so far as the commissioners of sewers may have rights over it, with which we have nothing to do. And if the level of the street had been altered by the works of the defendants, or its inclination changed for the worse, or its use as a highway taken away by its being stopped, it might be said that the particular right of the plaintiff had been infringed, so as to give him a claim for compensation.

It appears to me that the judgment of the house of lords in *Ricket v. The Metropolitan Ry. Co.* ⁽¹⁾ gives authority to the ground upon which Lord Cranworth puts his judgment. The question in that case was the right to compensation in respect of the obstruction of a public street communicating with a public footway, by the side of which the plaintiff's premises were situated. The case was therefore like the present one; the obstruction here is of a public river communicating with the street adjoining the plaintiff's premises; there it was of a public street. There is, no doubt, the distinction that in that case the obstruction was not permanent; in the present it is; but this it is submitted can make no difference in the construction to be given to the words "injuriously affected." Lord Cranworth [197 says, in that case ⁽²⁾: "Both principle and authority seem to me to show that no case comes within the purview of the statute unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its lights or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature." And he adds, after a few sentences: "The loss occasioned by the obstruction now under consideration may be greater to the plaintiff than to others, but it affects more or less all the neighborhood. He has no ground of complaint differing save in degree from that which might be made by all the inhabitants of houses in the town where the works for forming the railway were carried on." Lord Chelmsford's judgment is principally occupied with an elaborate discussion of all the authorities, but before examining them he bases his judgment upon the rule that the act complained of must have been the subject of an action unless legalized by parliament. His lordship, in considering whether an action would be maintainable, first adverts, in general, to the case of personal injury or injuries of that nature arising upon

⁽¹⁾ Law Rep., 2 H.L., 175.

⁽²⁾ Law Rep., 2 H. L. at p. 198.

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the obstruction of a highway. In such cases, though no doubt an action would lie, there could clearly be no compensation, and then the subject is not further noticed. He then refers to the cases in which an action is said to be maintainable in respect of damages connected with the occupation of the premises, and after examining the adverse authorities, and referring to *Rex v. London Dock Company* ⁽¹⁾, and the judgment of Erle, C.J., in the Exchequer Chamber in the case before them, he holds that such damages are too remote to be the subject of an action for a public nuisance, and, therefore, not the subject of compensation. Now the words "too remote" are used in connection with the judgment in *Rex v. London Dock Company* ⁽¹⁾, as being the effect of the judgment there. Those particular [198] words "too remote" were not used, but the judgment was that the words "injury to an estate or interest in land" would be satisfied by such consequences as the following, "as if by their cut, or bridge, or any other work, they had weakened the foundations, damaged the lights, stopped the drains, or done any similar injury to the houses, lands, &c." It is not, therefore, too much to say that by the words "too remote" his lordship meant too remote from or not connected with injury to the premises themselves, and this would make the opinion of Lord Chelmsford in effect and substantially the same as that of Lord Cranworth already given. His lordship then goes into a full examination of all the authorities, so that the house may give an authoritative final decision upon the whole case. Lord Chelmsford's judgment was delivered before that of Lord Cranworth, but I do not think it can be doubted, after reading it through, that if it had followed that of Lord Cranworth, he would have assented to Lord Cranworth's language above quoted, and the case was accordingly held to be one in which compensation could not be given, and the judgment of the Exchequer Chamber to that effect was affirmed. If the view taken of Lord Chelmsford's judgment be correct, it would not, I apprehend, be disputed that the decision of the court below is at variance with the ground of decision of the house of lords and cannot be supported.

This case was decided in the year 1867, but there was an earlier case in the house of lords decided in the year 1857, in which a similar question arose, viz., *Caledonian Railway Company v. Ogilvy* ⁽²⁾. In that case, as I understand the facts from the judgment, a public road which was the principal access to a residence was obstructed by a railway crossing it on a level within a few yards of the lodge. Without the act of parliament this would have been a nuisance, and the subject of an action

⁽¹⁾ 5 A. & E., 168.

⁽²⁾ 2 Macq., 229.

at the suit of any person who could show a particular damage of a different nature from that suffered by the public generally.

The jury assessed the damages for the level crossing and severance at 560*l.*, and it was held by the house of lords that the level crossing gave no claim for compensation, reversing the judgment of the Scotch court. In that case the obstruction was of a *highway, in the present case it is of a public [199 river, which is also a highway, and this is the main distinction between the two cases, with the addition that in the present case the obstruction is complete; in the other it was partial, an addition unimportant in principle if the obstruction was injurious. The case was decided by Lord Cranworth and Lord St. Leonards. Lord Cranworth thought the case clear both upon principle and authority upon the ground that though the plaintiff suffered by the obstruction more than any other person, yet he did not suffer differently, and therefore could not have maintained an action. He says at page 236, "But it would only be a more frequent repetition of the same damage; it would not be any damage different from that which might be sustained by any other subjects of Her Majesty; for all attempt at arguing that this is a damage to the estate is a mere play upon words." Lord St. Leonards decides the case substantially upon the same ground. But there are passages in his judgment which deserve particular notice. He points out the distinction between the case itself and those cases in which the highway which the premises adjoin is itself interfered with, a distinction of importance in dealing with the two cases on which the plaintiff mainly relied, viz., *Beckett v. Midland Ry. Co* ⁽¹⁾, and *Chamberlain v. West End of London, &c., Ry. Co.* ⁽²⁾. At page 248 Lord St. Leonards says, in reference to the case of *Reg. v. Eastern Counties Ry. Co.* ⁽³⁾, "In that case there was an actual injury I should say to the land; at all events there was an injury to the owner of the land, which would give him an immediate right, no doubt, to compensation. From his land he had been enabled to step at once upon the road which had been lowered by the company, and so lowered that he lost his access to that road unless he had new appliances in order to enable him to approach it. There was, therefore, a real injury, there was a ground of complaint there personal to himself, and which was not open to the rest of the world. It was a general complaint when he got to the road; when he got there he had to sustain an injury in common with all the rest of the queen's subjects; that is to say, the road

⁽¹⁾ Law Rep., 3 C. P., 82.

⁽²⁾ 2 B. & S., 605, 617; 31 L. J. (Q.B.), 201; 32 L. J. (Q.B.), 173.

⁽³⁾ 2 Q. B., 847.

200] might be rendered a great deal less *easy to travel upon than it was before it had been crossed. For that he would have no remedy, it is a common inconvenience; all are subject to it; and the power to commit that injury was given by act of parliament for the public benefit, and therefore the benefit which is received by the public from the railway is considered to be the only compensation to which the queen's subjects in general are entitled in respect of the damage caused at the particular spot over which the railway traveled, or in respect of which the road in that spot had been lowered."

He afterwards, at page 251, refers to the case of *Rey. v. Bristol Dock Company* ⁽¹⁾. In that case the person complaining was a brewer, who had carried on his trade by means of water drawn from a navigable river by means of pipes. The defendants, in the execution of public works, had fouled the river, and made the water unfit for brewing, and they were bound to make compensation to persons whose premises were damaged or made useless, or to purchase them, at the option of the owner. The brewer endeavored to supply the defect by procuring other water, but was unable to do so, and abandoned the premises. It was held not to be a case within the act, because the right to pure water was not a particular right belonging to the owner in respect of his premises, but a general right enjoyed by all the public; Lord St. Leonards is unable to distinguish that case in principle from *Ogilvy's Case* ⁽²⁾, and it appears to me, I must say, almost impossible to distinguish it from the present case. His lordship says, at p. 251, "It was held that he had only a general right; that nobody had any particular personal right to the water; that it was common to all the king's subjects; that therefore he was not entitled to recover upon that ground alone. Now where is the difference between a public river and a public road? The rights of both are common. A public river is, in point of fact, a highway; and a public road is a highway. You use each according to its quality, and if you have only that common right which belongs to all men, you cannot claim compensation in regard to a damage to either the one or the other which is authorized by act of parliament; and if any such case parliament ever did intend that compensation should be given, it is perfectly manifest that it would be given generally 201] to all *within a certain limit, because there must inevitably be damage to many to a certain extent.

The present case is one of the stopping up of the flow of a river at a particular spot in which the plaintiff has no different right from that of any other of Her Majesty's subjects; and the authorities given, I feel bound to say, appear to me to establish

⁽¹⁾ 12 East., 429.

⁽²⁾ 2 Macq., 229.

that the claim to compensation in such a case cannot be maintained; to allow it would be to break in upon a rule established by the highest authority upon full consideration, and which prevents the mischief referred to by Lord Cranworth and Lord St. Leonards. It would also introduce very great uncertainty as to the extent of liability to which all bodies executing great public works would be exposed, because their liability would depend not upon any facts capable of being ascertained, but upon the speculative opinion of surveyors and other witnesses upon the deteriorating effect of the works upon premises situated at a greater or less distance; as to which a case of deterioration by the loss of the contingent advantages of an available navigation might readily be believed in and easily established. The matter is of such general importance, involving a principle applicable to so many cases, that I have felt bound to give effect as far as I could to my own opinion, though differing from so many of my learned brothers. But although the authorities in the house of lords referred to would be considered binding even if they varied from decisions of other courts, I ought not to pass by without noting the two cases upon which the plaintiff particularly relied. *Beckett v. Midland Ry. Co.* ⁽¹⁾ was one of those cases.

In that case the plaintiff's premises adjoined a public highway, and the works of the defendants had narrowed the highway from fifty feet to thirty-five feet, and there was evidence that the consequence was that carriages could not turn opposite the house as before, and that omnibuses, instead of stopping to allow himself and other passengers to alight opposite his house, stopped where they could turn. The evidence was no doubt slight, but still there was evidence for the jury that the plaintiff had not the same beneficial access to the highway in front of his house which he had before. This was properly considered a particular injury and *restriction of the right of the in- [202]dividual in the enjoyment of the house so as to give a claim for compensation. And the chief justice, in his judgment, puts the decision on that precise ground. The case is brought within the observations of Lord St. Leonards in connection with the case of *Reg. v. Eastern Counties Ry. Co.* ⁽²⁾, which I quoted at length from their bearing upon *Ricket's Case* ⁽³⁾. The same remark applies to the case of *Chamberlain v. West End of London, &c., Ry. Co.* ⁽⁴⁾, which being a judgment in the Exchequer Chamber, was mainly relied upon as binding on this court. For although the facts are not so clear as could be desired, sufficient

⁽¹⁾ Law Rep., 3 G.P., 82.

⁽²⁾ 2 Q. B., 347.

⁽³⁾ Law Rep., 2 H.L., 175.

5 ENG. REP.]

⁽⁴⁾ 2 B. & S., 605, 617; 31 L.J. (Q.B.), 201; 32 L.J. (Q.B.), 173.

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appears to show that the works of the defendants had deprived the plaintiff's house of the right of being roadside premises adjoining a public highway as much as if the site of his house had been changed. The case is so much relied on that I must be permitted to quote what Erle, C.J., says of it in delivering the judgment of the majority of the court in the Exchequer Chamber in *Ricket v. Metropolitan Ry. Co.* ⁽¹⁾. The passage cited, and indeed the whole judgment, has a close bearing on the present case. "The principle is, that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from the one to the other, and by the circumstances of the highway itself tending to make it useful and agreeable to the occupier of the house. If a house on a level with a commodious, beautiful, well-frequented street, either be lifted or sunk by the railway twenty feet above or below the level of that street, the house would be injuriously affected both for pleasure or profit by means of the change in the access to and from the house, or if a house, fronting to a street of that description, should be turned round so as to front to a dark back alley, the house would be injuriously affected. The site of the house would be altered for the worse. In these cases suggested the house is supposed to be removed to make the meaning more clear, but if instead of lifting or sinking the house, or turning its front from a grand street to a bad alley, the street is lifted, or sunk, or changed 203] *in its character, the relation of the house to its highway is affected precisely in the same degree as it would be by altering the relative position of the house itself in respect of this highway." Such is the principle of *Chamberlain v. West End of London, &c., Ry. Co.* ⁽²⁾ "The frontage had been to a wide well-frequented road leading to and from important towns; by the execution of the railway works it was made to front to a dumb alley much below the level of the substituted thoroughfare over a railway bridge along which the stream of passengers would be compelled to flow. Frontage gives the value to building ground; therefore the railway company took away valuable frontage and substituted that which was very inferior, and therefore it was held that they had injuriously affected the house both in its frontage and in its access to and from the effective thoroughfare of the locality." After reading the manner in which this court dealt with the case referred to, can it be regarded as an authority that every house in all the streets leading down to the Thames and in the streets connected with them would confer a right to compensation if it could be shown that

⁽¹⁾ 5 B. & S., 165.

⁽²⁾ 2 B. & S., 606, 617; 31 L. J. (Q.B.), 201; 32 L. J. (Q.B.), 178.

it was deteriorated in value by being deprived of the public use of the river? I do not think it necessary to consider the cases cited in which persons who have sustained particular injury by reason of the obstruction of a public highway or by any other public nuisance have maintained their action for damages. Because that is not of itself a test, as is pointed out by Lord Cranworth in *Caledonian Ry. Co. v. Ogilvy* ⁽¹⁾, and again very distinctly by Lord Chelmsford in *Ricket's Case* ⁽²⁾, and by one of the judges in this case in the court below. Although there is no right to compensation unless an action would have been maintainable, it does not follow because an action would be maintainable for damages sustained, therefore there is in all cases a right to compensation. If a man sustained such injury as a broken limb or a damaged horse he could maintain an action founded upon the unlawful obstruction of the highway; but that would not make it an injurious affecting of his premises, however near the obstruction. The claim is brought into existence by something voluntarily done afterwards, and although the damage may in some measure be connected as *to its [204 extent and frequency with the proximity of the premises, that is too remote a connection to constitute an injurious affecting. As this judgment is founded upon decisions in the house of lords in which those cases are examined, it would be superfluous to justify the decisions by a further examination of them. In many of the cases it would appear not to have been sufficiently borne in mind that if premises are injuriously affected, so as to give a right to compensation, the remainderman and reversioner would have the same right to compensation as the person in possession, that is of course if the injury was of a permanent character.

BLACKBURN, J. I will now deliver the judgment of my brother Archibald and myself, in which my brother Channell, before he ceased to be a member of the court, concurred. In this case the plaintiff is owner of real property which is much deteriorated in value in consequence of the works of the defendants having shut up a draw-dock which was a public waterway coming near to the plaintiff's property, but not actually touching it, the public highway being between. The plaintiff had no private right of way; but, in consequence of the proximity of the public dock, his premises were worth more either to sell or occupy. The jury assessed the amount of damage at 1900*l*. The question is, whether the plaintiff is entitled to receive compensation for this deterioration in value of his property? In *Chamberlain v. West End of London, &c., Ry. Co.* ⁽³⁾ the Court

⁽¹⁾ 2 Macq., 229.

⁽²⁾ 2 P. & S., 617; 32 L. J. (Q.B.), 173.

⁽³⁾ Law Rep., 2 H. L., 175.

of Exchequer Chamber decided that the plaintiff in that case was entitled to compensation for the depreciation of the value of his houses, the arbitrator having found that the stoppage of an old highway seventy yards from the plaintiff's houses had diminished the number of passengers, and so rendered the plaintiff's houses less suitable to be let as shops, and so diminished their value. There was no actual touching of the premises in that case more than in this; and if there is any difference in respect of the directness of the damage, it is more direct in the present case. If this decision still remains not overruled by the house of lords it is binding on us, and the plaintiff in the present case is entitled to our judgment. But after that case, *Ricket v. Metropolitan Ry. Co.* (1) was decided in 205] the house of lords, and *the house of lords, by a majority of two peers to one, decided that the plaintiff in that case was not entitled to compensation. The decision of the house of lords, the final court of appeal, is binding, not only on all inferior tribunals, but even on the house itself, and fixes the law, until the legislature thinks fit to intervene. We have, therefore, only one duty to perform, and that is, to discover whether the *ratio decidendi* of the house in *Ricket v. Metropolitan Ry. Co.* (1) does or does not contain in it a reversal of the decision of the Exchequer Chamber in *Chamberlain v. West End of London, &c., Ry. Co.* (2). The majority of the judges in the Exchequer Chamber in *Ricket v. Metropolitan Ry. Co.* (3) thought the two cases might stand together, for they reversed the decision of the Queen's Bench, though the decision in *Chamberlain v. West End of London, &c., Ry. Co.* (2) was clearly binding upon them. The distinction which Erle, C.J., made between them in delivering their judgment is to be found at pp. 164, 165, in the report in 5 B. & S.; and, if I understand it rightly, is that a diminution in the rent which Chamberlain received when letting his houses in consequence of the diminished facility of access deterring passengers from coming that way, and so diminishing the profits which the occupiers of the shops would make, was an injury to the houses; but that a diminution in the profit which Ricket received from his own occupation of his house as a public house from a precisely similar cause was only a personal injury. I cannot, speaking for myself only, at all agree in this distinction.

I think it necessarily follows, from the facts found in *Ricket v. Metropolitan Ry. Co.* (1), that the plaintiff's house would have let for a smaller rent during the twenty months that the obstruction continued; but such a distinction was certainly made.

(1) Law Rep., 2 H. L., 175.

(2) 2 B. & S., 605, 617; 31 L. J. (Q.B.), 201; 32 L. J. (Q.B.), 173.

(3) 5 B. & S., 156.

Whether the diminished value of a house to let or sell does or does not in itself constitute an injurious affecting of the land is another question. Lord Cranworth, in his judgment in *Ricket v. Metropolitan Ry. Co.* ⁽¹⁾, clearly was of opinion it did not. He says, p. 198, "Both principle and authority seem to me to show that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining [206] *party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of the buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature." If this is the principle of the decision of the house of lords, *Chamberlain v. West End of London, &c., Ry. Co.* ⁽²⁾ is clearly overruled, for in that case the works of the defendant did not come within seventy yards of the plaintiff's property.

In *Reg. v. Metropolitan Board of Works* ⁽³⁾ the Court of Queen's Bench thought that this was the *ratio decidendi* of the lords; and, therefore, in a case identical in principle with the present, gave judgment for the defendants. But in *Beckett v. Midland Ry. Co.* ⁽⁴⁾ the Court of Common Pleas took a different view of what was the *ratio decidendi* in *Ricket v. Metropolitan Ry. Co.* ⁽¹⁾. They seem to have considered it as proceeding partly on the remoteness of the damage, and partly on the same distinction which was put in the judgment of Erle, C.J., to which I have already alluded, and therefore as not overruling *Chamberlain v. West End of London, &c., Ry. Co.* ⁽²⁾ And in substance the Court of Common Pleas have followed that decision in the present case. Lord Westbury was clearly desirous, not only to support the decision in *Chamberlain v. West End of London, &c., Ry. Co.* ⁽²⁾, but to carry it a great deal further; whilst Lord Cranworth, as it seems to us from the passage already cited, clearly decided on a principle inconsistent with the decision in that case: we must look to the opinion of the lord chancellor to see whether the house of lords did overrule the decision or not. The lord chancellor did certainly proceed in part on the ground of the remoteness of damages, but he did not confine himself to it, but proceeds, at p. 188, to state his views on the whole case. It is unfortunate that two courts should have differed as to what

⁽¹⁾ Law Rep., 2 H. L., 175.

⁽²⁾ Law Rep., 4 Q. B., 858.

⁽³⁾ 2 B. & S., 605, 617; 31 L. J. (Q.B.),

⁽⁴⁾ Law Rep., 3 C. P., 82.

201; 32 L. J. (Q.B.), 173.

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these were. But we find, at p. 191, that the lord chancellor does expressly mention *Chamberlain v. West End of London, &c.*, 207] **Ry. Co.* (¹), and treats it at a right decision, apparently adopting the distinction made between this case and the case then at the bar by Erle, C.J., in the judgment delivered by him in the Exchequer Chamber. We think it not now the question whether that distinction was satisfactory or not, but whether the decision in *Chamberlain's Case* is overruled by the house of lords, or still a subsisting authority. We think, upon the whole, it is better to treat it as not yet overruled, leaving it to the house of lords, if we have misapprehended the effect of their decision, to correct it. We, therefore, affirm the judgment below.

BRAMWELL, B. In this case the plaintiff, by the execution of the works of the defendants, has sustained a damage in respect of his interest in certain premises, the value thereof being lessened by the execution of these works; which loss could not have been inflicted on him except under the powers given to the defendants by their act. In short, "he has sustained damage by reason of the exercise as regards such lands of the powers of the act" 8 & 9 Vict. c. 20, s. 6. In reason and justice he ought to be compensated. The only matter urged to the contrary, viz., that the public benefit justifies this uncompensated injury, is idle. If the public benefit will not authorize the taking of the smallest piece of land or the doing of the smallest injury to the structure of a building or its easements without compensation, neither can it in reason or justice authorize this loss without compensation. Unless it will pay to do the work, including in its cost compensation for losses, the work should not be done. There is no difficulty in ascertaining the compensation any more than in a case of a partial loss of light. No doubt vague claims may be made, and unfounded ones, but justice must be done to A. though at the risk of a fraudulent claim by B. Indeed, if the plaintiff's premises had been taken this source of value would have had to be taken into account and estimated, and this is also a strong argument for the plaintiff. For if the defendants, by taking the premises, would have to pay the whole value, why are they to do this damage gratis, or could they have stopped the draw dock and then taken the house at the diminished value? The loss, it is 208] *to be borne in mind, is by execution of powers given; because there may be a loss by new works to which this reasoning does not apply, as the diversion of traffic from an old by the making of a new road. But then the damage is not "caused by the exercise of the powers of the act." Take a plain case,

(¹) 2 B. & S., 605, 617; 31 L. J. (Q.B.), 201; 32 L. J. (Q.B.), 173

indeed the one I have supposed; a new road is made, traffic is diverted from an old one. The owners of the soil could, without statutory powers, have dedicated the new road to the public; or the owners of the soil could make a railway if they pleased and diminish the value of the houses in the town through which the old coach road ran, as at Maidenhead. They could not, indeed, in most cases, make the railway without statutory powers, because they would not take land by compulsion, cross and divert roads, and other things; but the railway injures property, not directly by exercise of any of their powers given by the act, but as an indirect consequence of the exercise of such powers, and of the dealing with land they have purchased as any owner might have dealt with it if he pleased. And, indeed, railways have been made without statutory powers, as that from Gravesend to Stroud, and the Festiniog Railway. But for the powers of the act the loss by the diversion of traffic would not have occurred, but the exercise of those powers does not cause it. Those powers are certainly not *causa causans*, and hardly a *causa sine qua non*. For the statute means exercise of the powers in relation to the land affected. And, indeed, the loss in such cases is caused not by the making of the railway but by its subsequent user. I say, therefore, that in this case there is a direct loss caused to the plaintiff by the exercise of powers conferred by the act of parliament, and that there is no reason why the plaintiff should not be compensated. And it seems to me legitimate to say, that the legislature ought not to have intended this, and legitimate and respectful to say that what it ought not to have intended presumably it did not intend, and that what it did not intend it has not enacted. I approach the consideration of the statute therefore with the belief that the true construction is in the plaintiff's favor. Now I agree that the words "injuriously" does not mean "wrongfully" affected. What is done is rightful under the powers of the act. It means hurtfully or "damnously" affected. As when we say of a man *that he fell and in- [209] jured his leg. We do not mean that his leg was wronged, but that it was hurt. We mean he fell, and his leg was injuriously, that is to say, hurtfully affected. At the same time, I am clearly of opinion that to entitle the parties interested to compensation, the injury or hurt must be such as could not lawfully be inflicted except by the powers of the act. I have above given my reasons for this. But I will shortly add that the words of the section show this. The lands must be "injuriously affected by reason of the exercise as regards such lands of the powers of the act." The act therefore injuriously affecting must be one which would be wrongful but for the statute. But I agree that it need not

be one for which an action would lie. It is enough that it would be indictable or might be prevented by injunction. Now clearly this stoppage of the draw dock would have been indictable and the defendants might have been compelled to abate the nuisance; besides, it is not to be presumed any one would break the law.

Further, I believe that they might have been prevented by injunction from doing, and compelled to undo if they did, the act which has caused the loss. If so, then, we have a thing done under the powers of the statute which could not have been lawfully done but for those powers, which if done might have been compelled to be undone, which directly causes a loss to the plaintiff in respect of his interest in these premises. Why is this not within the section? It says, "shall make to the owners, &c., of land injuriously affected by the construction of the works full compensation for all damages sustained by such owners, &c., by reason of the exercise, as regards such lands, of the powers of the act." I admit of course that the loss must be to the person in respect of his interest in the thing. That the thing, the premises, must be lessened in value, not merely that the person suffers in common with the rest of the public, or on account of something peculiar to him personally. I admit, for instance, that if a market gardener had usually landed his goods there and taken them to Farrington market he would have no claim, because no premises of his would be injuriously affected. It might be an inconvenience and even loss to him to get his goods to market in some other way. But his premises would not be injuriously affected. He would suffer as one of the 210] public, *more, perhaps, than any one else, but still as one of the public only; and it may well be, that though his loss is special, yet he must bear it as one of the public for the public gain, and on account of the difficulty of compensating in such cases. He would be injuriously affected, but not his premises. His case would be like that of a medical man injured by sanitary improvements under statutory powers, which, by diminishing sickness, diminished his practice. Nor is such an affecting one by the exercise of the powers of the act. No power of the act is directly applied to cause it; it is an indirect consequence only. Here the premises are injuriously affected, and for actual and potential purposes they are of less value. If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles off if there was no other within twenty of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected for present or other purposes, or the man,

whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were a thousand claims of 1000*l.* each. If they are well founded 1,000,000*l.* of property is destroyed, and why is not that part of the cost of the improvement; and if taken into account as such, why should not the loser of it receive it? On these principles I think the present case within the statute and give my entire concurrence in Lord Westbury's reasoning, from which the foregoing is borrowed. Of course, if there is any binding authority on the subject, reasoning is useless. But I think the cases are in such a condition that there is none on which we can act, and that the matter must be set right by the house of lords or by legislation. That being so, we may reasonably inquire how this case ought to be decided. *Ricket v. Metropolitan Ry. Co.* (1) would govern us did we know the *ratio decidendi*. Now, there is a *ratio decidendi* expressed by Lord Cranworth which would entitle the defendants to judgment. He appears to think that there must be some damage to structure or easement to constitute injurious affecting. Now, it does seem *strange that, the act and its results being the same, [211] the premises are injuriously affected or not according as the right hurt or injured is public or private as by grant or prescription. But, further, Lord Cranworth says, "or making it inaccessible by lowering or raising the ground immediately in front of it." I suppose the important word there is "immediately," making the thing peculiar to the house. But what in principle is the difference between "immediately" and five yards distant; what is the difference in principle between total inaccessibility and total loss and partial inaccessibility and partial loss? With great respect to his lordship's opinion and that of my brother Cleasby, they seem to give up their position in this. For lowering the ground in front would be no cause for compensation unless it was a highway; and if it is a highway the claimant has no right in relation to it except as one of the public. His premises being close to the road does not alter his case in principle, but in degree only. But Lord Cranworth's was not the *ratio decidendi* of Lord Chelmsford. Further, I agree in the remark of my brother Blackburn, that the judges and (for aught we can see) the lords in *Ricket v. Metropolitan Ry. Co.* (1) did not mean to overrule *Chamberlain v. West of London, &c., Ry. Co.* (2); and I agree with him in thinking that if that is the law, it is an authority for the plaintiff, and that the distinction between the two cases is unreal. Then, in order to reverse the

(1) *Law Rep.*, 2 H. L., 175.

(2) 2 B. & S., 605, 617; 31 L. J. (Q.B.), 201; 32 L. J. (Q.B.), 173.

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judgment we ought to be able to say that it is wrong on principle or authority. I cannot say it is on either.

KELLY, C.B. It is necessary, in the first place, to have a clear apprehension of the facts of the case. The plaintiff is the owner of a house and premises, in which he carried on the business of a carman, and the defendants, in order to construct an embankment, possessed themselves, under the powers of their acts of parliament, of a water-way or public highway called a draw-dock, leading from a portion of a highway, lying between the plaintiff's premises and the draw-dock, to the river Thames. The plaintiff, therefore, had a public way from his house and premises, across a space of twenty-one feet to the draw-dock, and 212] thence, by the draw-dock of the *length of 352 feet to its outlet on the Thames; and the defendants, by taking the draw-dock and constructing an embankment upon its site, have permanently destroyed and extinguished the public highway from a spot twenty-one feet from the plaintiff's premises to the river Thames. By this means the communication between the plaintiff's premises and the Thames has been taken away, and his premises have become less valuable, either to sell or to occupy, to the amount of 1900*l*. The question is whether the plaintiff is entitled to compensation under the Lands Clauses Act, 1845, which is incorporated with the defendants' act of parliament. A great many decisions, some of them seeming to conflict with each other, are to be found on this question, and it may be well to consider at the outset in what state of things claimants or plaintiffs, whose property, as alleged, has been prejudicially affected within the Lands Clauses Consolidation Act, have been held not entitled to compensation. And, first, it has been determined that loss of profits of trade is not within the act. Why this should be so; why a man should be deprived of the profits which he is acquiring in his trade, by means of a public highway in the immediate neighborhood of his premises being taken by a joint stock company, or other public body, and applied to their own use, and in many cases used for their own profit, and the injured trader should be entitled to no compensation, I have never yet been able to discover; but such is the law, as laid down by the house of lords, and this court is bound by their decision. So it has been decided that no compensation can be recovered where no action could be maintained if the wrong had been done not under the authority of an act of parliament; and further that it does not follow that even if an action might be maintained a claimant could necessarily obtain compensation within the Lands Clauses Acts. Finally, it has been held that the temporary obstruction, as in *Rickett's Case*, or the occasional obstruction, as in *Ogilvy's Case*, of a public highway, is not the

subject of compensation, and that the permanent extinction of a highway, but so distant from the premises of the claimant that he only sustains an injury in common with the public at large, is also not an injury within the meaning of the act. And Lord Cranworth has laid it down, to entitle a claimant to compensation "there must be a direct injury to the land itself, as by loosening the foundations of buildings upon it, obstructing its light or its *drains; making it inaccessible by lowering [213] or raising the ground immediately in front of it, or by some such physical deterioration."

On the other hand, it has never yet been determined that the permanent extinction of a public highway so near to the claimant's premises as directly to diminish their value to sell or to let, or to be enjoyed by the claimant himself, is not the subject of compensation within the act, and it will be found, upon a careful consideration of the authorities bearing upon this question, that such an injury has been held to entitle the party injured to compensation, and the decisions to that effect affirmed by a court of error and approved in the house of lords. In *Chamberlain v. West End of London &c., Ry. Co.* It was decided in the Queen's Bench, and afterwards in the Exchequer Chamber, that the destruction or extinction of a highway at a distance of seventy yards from the nearest of the plaintiff's houses alleged to have been injuriously affected, was an injury within the Lands Clauses Act, 1845, which entitled the plaintiff to compensation. In that case, the highway at the point of extinction was not only not in contact with the plaintiff's premises, but, as observed, at a distance of seventy yards; nor were the premises directly injured in any of the modes pointed out by Lord Cranworth in *Ricket's Case*, or otherwise than that, by reason of the proximity to the plaintiff's premises of that portion of the highway which had been taken for the purposes of the railway, the access to them by a substituted road was less convenient, and the premises had thereby become less adapted to the carrying on of a trade, and of less pecuniary value. All these requisites concur in the case now before the court, and it remains to be considered whether *Chamberlain's Case* must be taken to have been overruled by *Ricket v. Metropolitan Ry. Co.*⁽¹⁾ in the house of lords. Having carefully considered the facts and the language of the opinions delivered in this case of *Ricket's* it appears to me that it in no wise conflicts with the decision in *Chamberlain's Case*, and that it clearly and plainly is distinguishable from the case now before this court. First, the broad and substantial ground of the decision in *Chamberlain's Case* and in

⁽¹⁾ 2 B. & S., 605, 617; 31 L. J. (Q.B.), . . . ⁽²⁾ Law Rep., 2 H. L., 175. 201; 32 L. J. (Q.B.), 173.

214] this case is, that the portion of a *highway the taking of which by the defendants was complained of had been permanently and absolutely extinguished, and the plaintiffs in both cases had been for ever deprived of the use of it for themselves and all others resorting to their premises; whereas in *Ricket's Case*, the highway was not taken at all, and the access to it had been for a time only, and partially, obstructed, another temporary way to the plaintiff's premises had been substituted, and the highway itself ultimately restored to its former condition. It is true that the obstruction was continued for the long period of twenty months and it may be that as in *Wilkes v. Hungerford Market Co.* ⁽¹⁾ an action might have been maintainable for the continuance of the obstruction for an unreasonable time. But there is a marked and manifest distinction between a mere temporary obstruction, which must occasionally take place in a highway under a great variety of circumstances, as during the repairs of the way, or of the sewers, or of the gas-pipes, or water-pipes underneath it, and the permanent destruction of a way by which property in its neighborhood may be permanently and irreparably injured. But, further, the only damage found by the jury, or complained of by the plaintiff, was a loss of profit in his trade estimated by the jury at 100*l.*, a loss, which as already observed, the house of lords had decided not to be within the act of parliament.

Here, on the other hand, as in *Chamberlain's Case*, it is expressly found that the premises of the plaintiff, with reference to the use to which they might have been applied by any owner or occupier, have been permanently damaged or diminished in value. The decision, therefore, in *Ricket's Case*, upon the facts there found, is clearly distinguishable from *Chamberlain's Case* and this case, and is in express terms distinguished from *Chamberlain's Case* by Lord Chelmsford, one of the majority by whom that decision was pronounced. We are, however, bound not merely to consider the judgment itself of the house of lords, but to collect, as far as we are able to do so, the *rationes decidendi* from the language in which it was delivered. And it certainly appears from some expressions that fell from Lord Cranworth to have been his opinion that to constitute an injury within the 215] act, it must be *caused by something in contact with or directly and physically operating upon the land itself. But if such was really the meaning of his lordship, it is not only opposed to some of the authorities recognized by the decision to which he was a party, but inaccurately illustrates the proposition intended to be laid down. For "the raising or lowering of a highway in front of a claimant's premises" had not the

(1) 2 Bing. N. C., 281.

effect in the case referred to of rendering the premises inaccessible, though it diminished the facility of access; and the destruction of a portion of a highway by the construction of an embankment upon it at the distance of some fifteen feet from the claimant's house, is no more "an actual injury to the land itself" than the construction of a railway at the distance of seventy yards, or an embankment at the distance of twenty-one feet. Passing by, then, these remarks of Lord Cranworth, which would confine all claims to compensation within narrower limits than either the authorities or the provisions of the act of parliament have prescribed, and without calling in aid the able and elaborate opinion of Lord Westbury in support of the claim to compensation, I think we are warranted in holding that the true *rationes decidendi* in this case of *Ricket's* were, that the pecuniary injury complained of was confined to the loss of profit in trade, that there was no finding of any diminution in the value of the property, and that the highway in question had not been permanently extinguished or taken away, but only temporarily obstructed; all which reasons for the decision are inapplicable to either *Chamberlain's Case* or the case before us. *Caledonian Ry. Co. v. Ogilvy* ⁽¹⁾ is equally distinguishable from the present case. There the plaintiff complained, not of the permanent extinction of a highway, but only of an occasional and temporary obstruction by the shutting of the gates on either side of a railway for a few minutes or seconds at a time during the passing or expected passing of a railway train. There is therefore no decision to be found in any court of appeal that where a highway is not merely obstructed but permanently destroyed, so near to premises alleged to be injuriously affected as to render them of less pecuniary value by preventing an easy and convenient access to them by the occupiers and the public, the owner of the premises is not entitled to compensation. Upon [216 these grounds, therefore, supported by the many authorities referred to, consistent with the decisions of the house of lords, and in accordance with the strict principles of justice, I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

Attorney for plaintiff: *John Edmunds.*

Attorney for defendants: *W. W. Smith.*

⁽¹⁾ 2 Macq., 229.

See note 2 Eng. Rep., 493: *People v. Mayer, etc.*, 5 Lansing, 524, affirmed by Court of Appeals, Sept. 23, 1872.

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Lishman v. Northern Maritime Insurance Co.

Law Reports, 8 Common Pleas, 216.]

Feb. 8, 1873.

LISHMAN AND ANOTHER V. THE NORTHERN MARITIME INSURANCE COMPANY.

Insurance on Freight — Warranty as to the Amount of Insurance on the Hull — Non-communication of a material Fact coming to the Knowledge of the Assured after the Acceptance of the Risk.

A proposal for insurance on freight was made and accepted on the 11th of March. On the 16th the ship was lost. On the 17th the assured, with knowledge of the loss, but without communicating it to the insurers, demanded a stamped policy. The insurers then for the first time required to be informed as to the amount of insurance upon the hull, and inserted in the policy (which the assured accepted) the following warranty,—“Hull warranted not insured for more than 2700*l.* after the 20th of March.”

The vessel was in fact insured for an additional 500*l.* in an insurance club, by the rules of which all ships belonging to members were insured from the 20th of March in one year to the 20th of March in the following year, “and so on from year to year unless ten days’ notice to the contrary be given,” and in the absence of notice the managers were to “renew each policy on its expiration.”

Held, that, notwithstanding those rules, regard being had to the stat. 30 & 31 Vict. c. 23, ss. 7-9, the club-policy was not a continuing policy beyond the 20th of March of the current year, and that, the ship having been lost before that day, no new effective policy could have been made, and consequently that the warranty was complied with.

Held also that, the risk having been accepted by the insurers on the 11th of March, the addition on the 17th of a term for their benefit, and not affecting the risk, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th, and therefore, upon the authority of *Cory v. Patton* (Law Rep., 7 Q. B., 304), the non-communication of the loss was not a concealment of a material fact so as to avoid the policy.

DECLARATION: First count, upon a policy of insurance upon freight in respect of goods, &c., on board the ship *Mayflower*, at and from the Tyne to Argusteria in the sum of 400*l.*, alleging a total loss.

217] *Pleas: 3. That the defendants were induced to make and subscribe the policy and to become insurers to the plaintiffs, as alleged, by the fraud of the plaintiffs⁽¹⁾; 4. That, at the time of the defendants making and subscribing the policy and becoming such insurers, as alleged, the plaintiffs and their agents misrepresented to the defendants a fact then material to be known to the defendants, and material to the risk of the said policy; 5. That, at the time of the defendants making and subscribing the policy and becoming such insurers, as alleged, the plaintiffs and their agents wrongfully concealed from the defendants a fact then known to the plaintiffs and their agents, and unknown to the defendants, and material to be known to the defendants, and material to the risk of the said policy, that is to say, that

(1) This plea was withdrawn at the trial, and a plea allowed to be added, that the warranty in the policy was not complied with. (See post p. 218).

the ship and premises and goods had been and then were lost. Issue thereon.

At the trial before Brett, J., at the last summer assizes at Liverpool, the facts which appeared in evidence were as follows :

On the 11th of March, 1871, a clerk of the plaintiffs named Robson went to the defendants' office with instructions to insure the *Mayflower* for 400*l.* on freight from the Tyne to Argus-teria. He there saw Mr. Metcalfe, the secretary of the defendants' company, and an offer or proposal for the insurance was, according to the practice of the office, written by Robson, in Metcalfe's presence, in a book kept at the office for that purpose, called the "Order Book," or subsequently wafered or pasted therein, and Metcalfe agreed to accept the risk at a premium of 65*s.* per cent, and calculated the amount and debited it to the plaintiffs in the usual way, nothing being said at the time as to any special warranty to be inserted in the policy. It is not the practice of the defendant's company to give "slips" on accepting a risk ; but a stamped policy is made out and sent a few days after the receipt of the proposal.

The *Mayflower* was lost on the Long Sand, near Harwich, on the 16th of March, and the plaintiffs had notice of the loss by telegraph early on the following morning. In the course of that day the plaintiffs sent their clerk Robson to the defendants' office to ask for a policy, but did not communicate to [218 the defendants the fact that the *Mayflower* was then lost. The defendants' clerk, Alsopp, then for the first time inquired what the hull of the vessel was insured for. Robson went back to the plaintiffs' office to ascertain, and on his return told Alsopp that the vessel was insured for 2700*l.* ; whereupon Alsopp filled up and gave Robson a policy with the following warranty inserted therein, "Hull warranted not insured for more than 2700*l.*" The plaintiffs subsequently recollecting that there was a further insurance for 500*l.* on the ship in the National Mutual Shipping Assurance Association of Teignmouth, which would expire by effluxion of time on the 20th of March, sent Robson back to get the policy altered by adding to the warranty the words "after the 20th of March," which was accordingly done.

It was objected on the part of the defendants that the warranty in the policy was not complied with, because the policy with the National Mutual Shipping Assurance Association for 500*l.* was a continuing policy, in the absence of notice to terminate it on the 20th of March, 1871, as provided by the rules of the association ⁽¹⁾, and that the evidence to show that such notice

(1) Rule 1. "That the members of the one for the other of them, but each this association severally and respectively, not jointly or in partnership, nor only in his own name, insure each others' ships or shares of ships, from

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was given was insufficient; and that, inasmuch as the only legal contract between the parties was the stamped policy of the 17th of March mentioned in the declaration, and the loss which occurred on the 16th was known to the plaintiffs before the contract was complete and the policy was given out, the failure to 219] communicate that fact to the *defendants constituted a concealment of a material fact, and avoided the policy.

To this it was answered, that what passed on the 17th of March with reference to the warranty must be taken to relate back to the 11th, when the real and substantial terms of insurance were agreed on; and that the policy was not avoided by a stipulation subsequently inserted which in no degree affected the risk insured; and *Cory v. Patton* ⁽¹⁾ was relied on to show that an assured is not bound to make known to the underwriters facts which have come to his knowledge between the time of the giving out of the slip and the execution of the policy.

The learned judge left it to the jury to say, first, whether the defendants had accepted the risk on the 11th of March; secondly, whether there was any breach of the warranty; thirdly, whether the fact that the vessel was lost was material to be known to the underwriters on the 17th of March.

The only evidence that a notice had been given to terminate the policy in the National Mutual Shipping Assurance Association was this: The plaintiffs' clerk said: "A paper writing had been sent to the Teignmouth club. I believe it was sent on the 20th of February. At the same time I made a note against the 500*l.* policy in the plaintiffs' policy-book, to this effect, 'To be withdrawn before the 20th of March.'" Upon this the learned judge told the jury that, if they thought that the policy was to expire on the 20th of March, and that notice was given, then the warranty was not broken; otherwise it was.

The jury found that the risk was accepted on the 11th of March, and that there was no breach of warranty, and that it was not material to communicate the loss on the 17th.

A verdict was thereupon entered for the plaintiffs for 400*l.* leave being reserved to the defendants to move to enter a ver-

noon of the 20th day of March, 18—, or from the date of entry of each vessel respectively, until noon of the 20th day of March then next, and from that time until noon of the 20th day of March in the next succeeding year, and so on from year to year, unless notice to the contrary be given as hereinafter mentioned, against all losses, perils, and damages of whatever nature or kind soever, which may be sustained or received by their respective ships, or caused or done

by them to other ships or craft, except when on the voyages, in the trades, or under the circumstances, hereinafter particularly excepted."

Rule 25. "That the managers, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew the same, when the managers shall cause notice to be given to the owner."

⁽¹⁾ Law Rep., 7 Q. B., 804.

dict for them, if the learned judge ought to have directed the jury, as matter of law, that the warranty was not complied with, and that the fact concealed was material.

A rule having been obtained to enter a verdict for the defendants, on the ground that the judge ought to have directed the jury to find for the defendants, because there was concealment of a material fact, and that the warranty as to the amount of the insurance on the hull contained in the policy declared on was not complied with: or for a new trial, on the ground that the judge misdirected the jury as to what was to be deemed a concealment, and material to the risk, and as to the warranty being complied with, and improperly received an entry in the plaintiffs' book as evidence of such compliance; and also that the verdict was against the weight of evidence.

Feb. 7. *Holker*, Q. C., and *Gainsford Bruce*, showed cause. This case is governed by *Ionides v. Pacific Insurance Co.* (1) and *Cory v. Patton*. (2) Blackburn, J., in giving judgment in the former case, says (3): "The slip is in practice and according to the understanding of those engaged in marine insurances the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can without the assent of the other deviate from the terms thus agreed on, without a breach of faith." The "proposal" here represents the slip in ordinary cases. And in *Cory v. Patton* (4) it was held that, where underwriters have (as, by initialing a slip) made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is nevertheless in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honor and good faith whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of assurance afterwards executed. As to the warranty, there was abundant evidence that the 500*l.* policy would expire on the 20th of March: the policy-book was not admitted as evidence; it was merely referred to by the witness to refresh his memory as to a notice to discontinue that policy having been sent. Besides, no valid policy could have been executed by the Teignmouth club after the loss of the vessel; and the stat. 30 & 31 Vict. c. 23 and the rules of the club showed that the policy was at an end on the 20th of March. *Sect. 7 of that act enacts [221] that "no contract or agreement for sea insurance (other than such insurance as is referred to in s. 55 of the Merchant Ship-

(1) Law Rep., 6 Q. B., 674; Law Rep., 7 Q. B., 517.

(2) Law Rep., 7 Q. B., 304.

(3) Law Rep., 6 Q. B. at p. 684.

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ping Act Amendment Act, 1862 25 & 26 Vict. c. 63), shall be valid unless the same is expressed in a policy," &c.; and s. 8 enacts that "no policy shall be made for any term exceeding twelve months, and every policy which shall be made for any time exceeding twelve months shall be null and void to all intents and purposes." That clearly throws upon the defendants the onus of proof that a renewed policy had been issued by the club. The main point is whether there was a concealment of a material fact, so as to avoid the policy. It must now be assumed that the defendants accepted the risk on the 11th of March, all the terms of a complete insurance being then settled and agreed on. The warranty inserted on the 17th was no part of the contract.

[BRETT, J. The contract declared on is contained in the stamped policy with that warranty upon it.]

The defendants being bound in honor to issue a stamped policy on the terms of the contract of the 11th of March, it could not be at all material to them to be informed that the vessel was lost on the 16th. That is clearly decided by *Cory v. Pulton* (*). The fact concealed was perfectly immaterial so far as the warranty was concerned.

Herschell, Q.C., and *Crompton*, in support of the rule. The warranty that the hull was not insured for more than 2700*l.* after the 20th of March, was not complied with. There being no evidence that notice to discontinue the 500*l.* policy had been given, it was, at the time the contract of insurance declared on was made, a subsisting insurance for another year. Rule 1 is not an undertaking to renew, but an absolute continuing insurance until notice.

[KEATING, J. Notwithstanding the statute 30 & 31 Vict. c. 23, s. 8, expressly enacts that "every policy which shall be made for any time exceeding twelve months shall be null and void to all intents and purposes?"]

Sect. 9 contains the following exception: "any policy of mutual insurance having a stamp or stamps impressed thereon 222] *may, if required, be stamped with an additional stamp or stamps, provided that at the time such additional stamp or stamps shall be required the policy shall not have been signed or underwritten to an amount exceeding the sum or sums which the stamp or stamps previously impressed thereon will warrant." The 500*l.* policy was, according to the Teignmouth club rules, a continuing policy unless notice was given to terminate it on the 20th of March. The only proper evidence of such notice having been given would be the notice itself. The mere statement of the plaintiffs' clerk that a paper writing had been sent,

(*) Law Rep., 7 Q. B., 304.

without showing what that paper writing was, was clearly not sufficient; and the entry in the policy book did not carry the matter any further.

[KEATING, J. If the manager of the Teignmouth club knew that the ship was lost on the 16th of March, would he still be bound to issue a stamped policy on the 20th?]

Unless the club insurance is a continuing insurance, there is an end of the first point. The important question still, however, remains, viz. whether there was a concealment of a material fact at the time the insurance was effected. The terms of the policy sued on (with the warranty clause) never were agreed on until after the loss was known to the assured; and the non-communication of the loss was a concealment of a material fact, which avoided the policy. It may be conceded, upon the authority of *Cory v. Patton* ⁽¹⁾, that, notwithstanding the stat. 30 & 31 Vict. c. 23, the real bargain between the assured and the underwriters takes place when the slip containing the terms of the intended policy is accepted, and that a material fact coming to the knowledge of the assured between the date of the slip and that of the policy need not be communicated. Here, however, the terms were not agreed on until the 17th of March, after the loss of the *Mayflower* was known to the plaintiffs. That constitutes a material distinction between the two cases. How could the jury be warranted in finding that the contract declared on was entered into on the 11th of March, when one material term of it was only discussed and settled on the 17th? If a complete and final contract had been made before *the [223 loss was known, the fact would have been immaterial, and need not have been communicated. [*Morrison v. Universal Marine Insurance Co.* ⁽²⁾ was also referred to.] *Cur. adv. vult.*

Feb. 8. The judgment of the court (Keating, Brett, and Grove, JJ.) was delivered by

KEATING, J. This was an action on a marine policy of insurance upon freight, and was tried before my brother Brett at the last Liverpool summer assizes, when a verdict was found for the plaintiffs for 400*l.*, as upon a total loss of freight.

It appeared that the plaintiffs, shipowners, being desirous of insuring the freight in question, on the 11th of March, 1871, sent to the defendants, who were underwriters at Newcastle-upon-Tyne, to inquire the terms of insurance, and ultimately an agreement was made at 65*s.* per cent, and a slip or proposal drawn up and accepted by the defendants at that rate. The slip contained all the necessary terms for a complete insurance at the above rate, and was drawn up without any question

⁽¹⁾ Law Rep., 7 Q. B., 304.

⁽²⁾ Law Rep., 8 Ex., 40.

whatever being asked as to the amount of insurance upon the hull of the vessel.

On the 16th of March the ship was lost, and the plaintiffs knew of the loss on the 17th. They sent on that day to the defendants for a stamped policy in pursuance of the terms of the slip; and then for the first time the defendants required to know in what amount the hull of the ship had been insured. The plaintiffs had in fact effected insurances upon the ship amounting to 2700*l.*, and a further policy for 500*l.* with the Mutual Shipping Insurance Association of Teignmouth, of which he was a member, by which the insurance was to be for a year from the 20th of March preceding, with renewal from year to year unless determined at the end of a year by notice from either party. Upon the requirement of the defendants' clerk, the plaintiffs' clerk gave the amount insured on ship at 2700*l.*, when the defendants inserted that amount as a warranty in what they stated to be a copy of the policy. The plaintiffs, however, sent it back in consequence of its not including the 224] amount insured by the policy for 500*l.* on ship; *and the words "after the 20th March" were added, and a stamped policy with that warranty given out.

No communication was made by the plaintiffs to the defendants of the loss of the ship before or at the time of the delivery of the policy.

Upon this policy the plaintiffs sued; and the defenses set up were, a non-compliance with the above warranty, and also a concealment of a material fact, viz. the loss of the ship.

At the conclusion of the plaintiffs' case, the defendants objected that the warranty was not complied with, because the policy for the 500*l.* was a continuing policy beyond the 20th of March unless notice to terminate it at that time were proved, and there was no evidence of such notice. They also objected that, inasmuch as the real and only legal contract between the parties was the stamped policy of the 17th of March declared on, and the loss having occurred on the 16th, and known to the plaintiffs on the 17th, the omission to communicate it on that day constituted the concealment of a material fact, and avoided the policy.

The learned judge asked the jury whether the warranty was complied with, and they found it was; and, in answer to other questions, they found that the risk was accepted by the defendants on the 11th of March, and that it was not material to make known the loss to the defendants upon the 17th. The verdict thereupon passed for the plaintiffs, with leave to the defendants to move to enter a verdict for them, if the judge ought to have directed the jury as matter of law that the warranty was not

complied with, and that the omission to communicate the loss on the 17th was a concealment of a material fact, which avoided the policy.

A rule was obtained upon that ground, with the alternative of a new trial on the ground of misdirection, on the part of the learned judge in not so directing the jury, and also that the verdict was against the weight of the evidence. That rule has been argued; and the questions raised were those insisted on at the trial.

Mr. *Herschell*, for the defendants, argued, first, that the policy for the 500*l.* was a policy to continue beyond the 20th of March unless notice given; and, secondly, that there was no proof of notice. But it seems to me that, according to the terms of the *Teigumouth Mutual Shipping Insurance Association's [225] rules, and the words of the statute 30 & 31 Vict. c. 28, that policy was not a continuing policy, and that in this case no new effective policy could have been made on the 20th of March, the ship having been lost before that day.

This renders it unnecessary to consider whether the evidence to prove the notice was sufficient, if such notice had been necessary.

The great question, however, argued was whether there was a concealment of a material fact, so as to avoid the policy: and I am of opinion that there was not.

It was admitted by Mr. *Herschell*, in accordance with the decision of the Court of Queen's Bench in *Cory v. Patton* ⁽¹⁾, referring to *Ionides v. Pacific Insurance Co.* ⁽²⁾ in the Exchequer Chamber, that notwithstanding the provisions of 30 & 31 Vict. c. 28, ss. 7 and 9, the real bargain between the assured and the underwriters takes place where the slip containing the terms of the intended policy is accepted: and that, although such slip does not constitute a contract enforceable at law, yet it may be looked at for the purpose of discovering at what time the risk was really undertaken by the underwriters; and that a material fact coming to the knowledge of the assured between the date of the slip and that of the policy need not be communicated. Admitting this, however, Mr. *Herschell* contended with considerable force that, in this case the slip on the 11th of March could not show the terms of the bargain, as a negotiation between the parties was going on up to the 17th, when the policy containing the added warranty was issued, which contained the only complete contract of insurance between the parties, and therefore the case was distinguishable from *Ionides v. Pacific Insurance Co.* ⁽²⁾ and *Cory v. Patton* ⁽¹⁾.

⁽¹⁾ Law Rep., 7 Q. B., 304.

⁽²⁾ Law Rep., 6 Q. B., 674; Law Rep., 7 Q. P., 517.

In my opinion, however, the jury having found as a fact that the risk was accepted by the underwriters on the 11th of March, it cannot be said that the addition of a term for the benefit of the underwriters, and not affecting the risk, prevented the policy from being one drawn up in respect of the risk accepted on the 11th: the case, therefore, is the same in principle [226] with that referred to, *and the occurrence of the loss subsequently to the 11th, though before the issue of the stamped policy, did not render it incumbent on the plaintiffs to communicate it, inasmuch as it could not affect the risk already accepted or the premium already agreed to and paid.

I think, therefore, there was no misdirection on the part of the learned judge, that the evidence justified the verdict of the jury and their answers to the questions put to them, and that the rule must be discharged.

GROVE, J. I entirely agree with the judgment pronounced by brother Keating; and I have nothing to add.

BRETT, J. I also entirely agree; and I will only add that when I allowed a plea to be added, I did so upon the understanding that the question was to be left to the jury upon the evidence as it then stood.

Rule discharged.

Attorneys for plaintiffs: *Mercer & Mercer, for Oliver & Botterell, Sunderland.*

Attorneys for defendants: *Williamson, Hill, & Co., for R. P. & H. Philipson, Newcastle-upon-Tyne.*

[Law Reports, 8 Common Pleas, 227.]

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227] *MORS-LE-BLANCH AND ANOTHER v. WILSON AND ANOTHER.

Costs of Defending Action — Shipping — Bill of Lading, Construction of — Rights and Duties of Master where no Consignee appears to claim the Goods — Lien for Freight — Merchant Shipping Act, 1862 (25 & 26 Vict. c. 68), s. 68.

Where an action is brought against A. to recover unliquidated damages for which he has become liable through the default of B., notice being given to B. (who declines to intervene), A. is justified in defending the action, and is not bound to let judgment go by default, or to pay money into court.

The proper questions for the jury in such a case are, whether it was a reasonable thing to defend the action, and whether the defense was conducted in a reasonable manner.

The defendants shipped coals on board the ship *Pitho* for Buenos Ayres, under a bill of lading making them deliverable to the consignees on payment of freight, and containing a memorandum: "The coals to be taken from the ship as soon as the master is ready to deliver, or to be landed at the expense and risk of the consignees."

The *Pitho* arrived at Buenos Ayres on the 28th of November, 1869, and the master was ready to deliver the coals on the 23d of December; but, no consignees

appearing to claim them, he waited until the 20th of January, 1870, and then landed them. In an action against the defendants for damages for the detention of the ship at Buenos Ayres, it was left to the jury to say whether the defendants were responsible for the detention, and what would be a reasonable compensation for it. The jury found that the defendants were responsible for the detention, and they assessed the damages at 56*l*. But the judge having, in answer to a question from one of the jury at the close of his summing-up, stated that, there being no evidence that there were warehouses at Buenos Ayres such as existed at Liverpool and other places, into which goods might be placed and kept subject to the shipowner's lien for freight, under the Merchant Shipping Act, 1862, the owners would lose their lien by landing the coals :

Held, That, inasmuch as this answer was too general in its terms, and might have to some extent affected the assessment of damages, the defendants were entitled to a new trial.

Seemle that, although there was no "statutable" warehouse at Buenos Ayres, the master might still have landed the coals there without losing his possession and control over them (placing them in a warehouse belonging to or hired by his owners), and so have preserved his lien for freight.

The first count of the declaration stated that, in consideration that the plaintiffs, at the request of the defendants, would receive in the Thames, in a ship called the *Pitho*, a large quantity, to wit, 47½ tons of coal, and would carry the same from thence to Buenos Ayres, and there deliver the same to the defendants or their assigns *on certain terms, the defendants pro- [228] mised to and agreed with the plaintiffs that the said coal should be taken by the defendants or their assigns from the said ship as soon as the master of the ship was ready to deliver : *Averment*, that the plaintiffs did receive in the Thames in the said ship the said coal, and did, from thence carry the same to the port of Buenos Ayres, and they were and the master was ready and willing there to deliver the coal to the defendants or their assigns upon the said terms ; and that, although all conditions (except such as the plaintiffs were prevented by the defendants from performing) were performed by the plaintiffs, and all things and times respectively happened and elapsed necessary to entitle the plaintiffs to have the coal taken from the ship by the defendants or their assigns, yet the defendants did not nor did their assigns take the coal from the ship, whereby the ship was necessarily detained, and the plaintiffs, who had chartered the ship, incurred a great liability to the owners of the ship for and on account of the detaining of the ship.

The second count stated that, in consideration that the plaintiffs, at the request of the defendants, would receive in the Thames in a certain ship called the *Pitho*, a large quantity of coal, to wit, 47½ tons, and would carry the same from thence to Buenos Ayres, and there deliver the same to the defendants or their assigns on certain terms, the defendants promised that, in the event of the said coal not being taken by the defendants or their assigns from the ship when the master of the ship was ready to deliver the same according to the contract, the master

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might land the coal, and that the defendants would pay to the plaintiffs the expense incurred in and about such landing: Averment, that the plaintiffs did receive in the Thames in the said ship the said coal, and did from thence carry the same to Buenos Ayres, and they were and the master was ready and willing there to deliver the coal to the defendants or their assigns upon the said terms and according to the contract; but that the coal was not taken from the ship by the defendants or their assigns, although a reasonable time in that behalf elapsed before the coal was landed as thereafter mentioned; that the coal was landed, and in and about the landing of the same great expenses were incurred by the plaintiffs; and that, although all conditions were fulfilled and all times and things 229] *elapsed and happened necessary to entitle the plaintiffs to land the coal and to incur the said expenses, and to be paid the said expenses by the defendants, yet the defendants had not paid the same or any part thereof.

The third and fourth counts were similar to the second and third, in respect of 80 tons of coal shipped by the *Majestic* for *Monte Video*. There was also a count for freight.

Pleas to each of the special counts: 1. That the defendants did not promise or agree, as alleged; 2. That the plaintiffs did not receive or carry the coals, as alleged; 3. That the plaintiffs were not nor was the master ready or willing to deliver the goods, as alleged; 4. That the defendants agreed to buy from the plaintiffs, and the plaintiffs agreed to sell to the defendants and the defendants retained and employed the plaintiffs, and the plaintiffs promised the defendants and undertook, to put on board the said ship, and to carry and deliver to the defendants or their assigns, as in the count mentioned, certain coal called "smithy coal," and no other or different coal, and not the coal so received or carried as in the count mentioned; and that the plaintiffs, instead of selling and putting on board and receiving the coal so ordered by the defendants, put and received on board an entirely different coal from the said smithy coal, as the plaintiffs then well knew, and as the defendants did not know, until the time of the alleged breach in the count, and carried the same to Buenos Ayres [or *Monte Video*] as in the count mentioned, and they and the master were only ready and willing to deliver the said different coal as in the count mentioned, wherefore the defendants did not, nor did their assigns, take from the ship the last mentioned coal, the same not being smithy coal, but being coal of an entirely different description, and totally valueless to the defendants or their assigns; which was the breach in the said count; and that the defendants did not promise otherwise than as in that plea above mentioned, and there was no

receipt of coals otherwise than as above mentioned, that is to say, from the plaintiffs themselves, of the coals so carried as aforesaid, not being smithy coals or the coals so purchased as aforesaid; 5. A similar plea alleging the coals to have been bought by the plaintiffs for the defendants. To the last count there was a plea of never indebted. Issue thereon.

*The cause was tried before Brett, J., at the last summer [230 assizes at Liverpool, when the following facts were proved:

The plaintiffs are merchants carrying on business in Liverpool and London. The defendants are also merchants carrying on business at Liverpool and Buenos Ayres. The plaintiffs having chartered two vessels called the *Pitho* and *Majestic*, the former for Buenos Ayres and the latter for Monte Video, the defendants agreed to buy from them certain smithy coal to be shipped on the defendants' account by those two vessels, consigned to their correspondents at Buenos Ayres and Monte Video, respectively, viz. 47½ tons by the *Pitho*, and 80 tons by the *Majestic*. By the bills of lading, which were dated respectively the 10th of July and 12th of August, 1869, a freight of 30s. and 27s. per ton was to be paid by the consignees; and there was a memorandum in the margin, as follows: "The coals to be taken from the ship as soon as the master is ready to deliver, or to be landed at the expense and risk of the consignees."

The *Majestic* arrived at Monte Video, and the master was ready to deliver the coals on the 24th of January, 1870. No one claiming the coals, the master advertised for the consignees, and at length one of the defendants came on board and inspected the coals, but he declined to receive them, alleging that they were not "smithy coal." After a delay of some days, the coals were landed under a decree of the Tribunal de Commerce. By this refusal of the consignee to accept the coal, and the proceedings in the Tribunal de Commerce, the *Majestic* was detained at Monte Video until the 12th of March. For this detention, the ship-owner brought an action against the now plaintiffs upon the charter, claiming damages, there being no stipulation for demurrage. The now plaintiffs gave the defendants notice of the action having been brought, and, the latter declining to interfere, the now plaintiffs defended it, and the jury found a verdict against them for 56*l.*, being fourteen days' detention, at 4*l.* per day; and that verdict was upheld by the court. The costs incurred by the now plaintiffs in that action amounted to 208*l.*

The *Pitho* arrived at Buenos Ayres on the 28th of November, 1869, and the master was ready to deliver the coal on the 23d of December; but, notwithstanding that advertisements were

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231] published, *no consignees appeared to claim it, and it was ultimately landed on the 20th of January, 1870.

The present action was brought to recover from the defendants 179*l.* 5*s.* due for the carriage of the coal, the 56*l.* recovered by the owner of the *Majestic* against the plaintiffs for the detention of that ship at Monte Video, and 208*l.* the costs of the action and defense in that case, and also damages for the detention of the *Pitho* at Buenos Ayres.

The judge left it to the jury to say, first, whether the defendants were responsible for the detention of the vessels at Monte Video and Buenos Ayers, and what would be a reasonable compensation for that detention; secondly, whether it was a reasonable thing for the plaintiffs to defend the action brought against them by the owner of the *Majestic*; thirdly, whether that action was defended in a reasonable manner.

The jury assessed the damages for detention in the case of each vessel at 56*l.*, being fourteen days, at 4*l.* per day; and they answered the second and third questions in the affirmative.

The foreman of the jury having, at the close of the summing-up, asked whether the captain would have lost his lien for freight upon the coal if he had landed it at once, the judge told them that, there being no evidence that any such warehouses existed at Buenos Ayres as there were at Liverpool, London, and other large commercial cities, into which goods might be placed and kept subject to the ship-owner's lien for freight, under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 68, and other acts, the owners would have lost their lien by landing the coal.

A verdict was thereupon taken for the plaintiffs for 499*l.* 5*s.* being 179*l.* 5*s.* for freight, 112*l.* for the detention, and 208*l.* the costs paid and incurred in defending the action at the suit of the owner of the *Majestic*.

Holker, Q.C., in Michaelmas Term last, moved to reduce the damages by 208*l.*, the costs above referred to; or for a new trial, on the ground that the verdict was against the weight of evidence, and also on the ground that the judge misdirected the jury in telling them that, if the masters of the vessels landed the coal, the ship-owners would lose their lien for freight, and 232] that they *could not land the coal without losing their lien. As to the costs, having no answer to the action brought against them by the owners of the *Majestic*, the plaintiffs ought not to have defended.

[BRETT, J. No demurrage being specified in the charterparty the claim against the charterers was for unliquidated damages; and the present defendants refused to take up the defense of that action. What could the plaintiffs do under the circumstances?]

They might have allowed judgment to go against them by default, an assessment of damages being far less costly than a trial; or they might have paid money into court: *Short v. Kalloway* (1); *Tindall v. Bell*. (2)

[BRETT, J. Both those cases are referred to in 1 Smith's L. C., 6th ed., p. 149, and the note goes on: "And, where the plaintiff's claim is of an unliquidated nature and needs investigation, it seems that he [the defendant] may, unless expressly forbidden, incur the expense of investigating it, or at least that very slight evidence is enough to raise an inference that the person ultimately liable has assented to his doing so: *Blyth v. Smith*. (3) It seems to be for the jury in each case to say whether, in defending, and incurring the costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man unindemnified would do in his own case; and, if the jury find that he did, the costs may be recovered."]

As to the reasonableness of the defense, the verdict was clearly against the weight of evidence.

[BOVILL, C.J. Who but the jury could be proper judges of the reasonableness of the defense?]

As to the master's right to land the coal, the learned judge misdirected the jury in telling them that he could not do so without abandoning his lien for freight.

[GROVE, J., referred to Smith's Mercantile Law, 8th ed. p. 559.]

BRETT, J. The acts of parliament by which the ship-owner's lien is preserved do not apply to Buenos Ayres or Monte Video.]

BOVILL, C. J. Upon the first point raised in this case, viz., the plaintiff's right to recover the costs incurred by them in the action *brought against them by the owner of the *Majestic*, [233 it seems to me that the proper question was left to the jury by my brother Brett, viz., whether it was a reasonable thing for the plaintiffs to defend that action, and whether the defense was conducted in a reasonable manner. This question is constantly arising in a variety of forms. A party is frequently put to considerable difficulty where the action is brought for unliquidated damages. As a general rule, he must not recklessly defend the action, and so heap upon the person eventually liable unnecessary expense. But, on the other hand, if he places all the facts before the person whom he seeks to charge, and that person declines to intervene, and leaves him to take his own course, it surely must be for the jury to say whether it was reasonable to defend, and whether the defense was conducted in a reasonable manner. I do not see what other question

(1) 11 A. & E., 28.

(2) 11 M. & W., 228.

(3) 5 Man. & G., 405.

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could be left; and we have the authority of Parke, B., in *Tindall v. Bell* ⁽¹⁾, for saying that it is the only proper question. If, under the circumstances, it would have been more prudent to settle the claim by a compromise, or to pay money into court, or to allow judgment to go by default, that would have afforded topics for observation and comment: but it must at last be left to the jury; the judge could not take upon himself to decide it as a matter of law. I therefore think there was no misdirection in this respect. Then, it is said that the verdict was against the weight of evidence. The circumstances of the case were very peculiar. The whole matter was before the jury; and my brother Brett does not report to us that he is dissatisfied with the result. I think, therefore, there should be no rule on that ground. Another question, however, has been raised which from the peculiar form of the bill of lading becomes of some importance, viz., as to what would have been the effect, as to the masters' lien for freight, of landing the goods at their ports of destination. That is a point which I think deserving of consideration, and upon that the rule may go.

GRÖVE, J. I am of the same opinion. The question as to the right to recover the costs of defending an action has frequently arisen. Formerly it was held that the person against whom the action was brought was bound to defend, giving notice to the 234] person *whose default caused it to be brought. That is now no longer the rule; and the proper course is that which was pursued here, viz., to leave it to the jury to say whether or not it was a reasonable thing to defend, and whether the defense was conducted in a reasonable manner. It is impossible for the judge to lay down any absolute criterion. It might be right to compromise in one case, but not in another. The jury in this case have found that it was a reasonable thing to defend the action, and that the defense was conducted in a reasonable manner. The learned judge is not dissatisfied with their finding, and I see no ground for a new trial on that point. The direction of my brother Brett, however, as to the effect upon the masters' lien of the landing of the coal, seems to present a question very fit for discussion.

DENMAN, J., concurred.

Rule nisi.

C. Russell, Q.C., and Trevelyan, showed cause. The clause in the margin of the bill of lading was introduced for the benefit of the ship-owner, and not in restraint of his rights. If there had been no such clause, it is quite clear that, so long as there was any reasonable probability of a consignee turning up, the ship owner had a right to hold the coals in his own hands, in

⁽¹⁾ 11 M. & W., 228, at p. 531.

order to secure his lien. He does not cease to be a carrier by sea immediately on the arrival of the ship at the port of destination of the goods. He is not bound to land the goods immediately, even though, by force of the memorandum or otherwise, he could still preserve his lien for freight; *Black v. Rose* ⁽¹⁾. Assuming, therefore, that the answer given to the question put by a juryman after the summing up was incorrect, it was wholly immaterial. There is very little authority upon the question whether the master can, under any ordinary bill of lading, and independently of the provisions of the Merchant Shipping Act, 1862, land the goods and still retain his lien for freight. In the 5th edition of Abbott on Shipping, p. 248, the learned author treats the subject very cautiously. He says: "In England, the practice is to send such goods as are not required to be landed at any particular dock, to a public wharf, and order the *wharfinger not to part with them till the freight and [235 other charges are paid, if the master is doubtful of the payment. And, by the law of England, if the master once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and cannot afterwards reclaim them." This is repeated in all the subsequent editions; and it is amplified in Smith's Mercantile Law, 7th ed., p. 564, 8th ed., p. 559: "As a lien is a right to retain possession, it follows of course that, where there is no possession, there can be no lien. It also follows that, where the possession of the goods has once been abandoned, the lien is gone; but, where the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for the freight; and, where they are not required to be landed at any particular dock, the common practice is, to land them at a public wharf, and direct the wharfinger not to part with them till the charges upon them are paid; in this case, the wharfinger is the ship-master's agent, and the goods remain in the constructive possession of the latter," that is, of the master. The judgment of Willes, J., in *Meyerstein v. Barber* ⁽²⁾ is to the same effect. In Maclachlan's Supplement, p. 42, the author, observing upon these provisions of the Merchant Shipping Act, 1862, says: "Hitherto, except at certain ports which are privileged by act of parliament, it has been a difficulty of great practical moment what course to advise a ship-master to follow, when, in consequence of differences between the parties concerned, the consignee of the cargo refuses to accept the goods. At one of the privileged ports he could land and warehouse the

⁽¹⁾ 2 Moore, P. C. (N. S.), 277.

⁽²⁾ Law Rep., 2 C. P., 38, at p. 53; Ex. Ch. Law Rep., 2 C. P., 661; Dom. Proc. Law Rep., 4 H. L., 317.

cargo, subject to his lien for freight, thereby saving all rights at the least possible expense. Elsewhere this could not be done, because his lien for freight, being at common law as distinguished from a maritime lien, would have been destroyed by the transfer of possession." In the present case, there was no evidence that there was any privileged warehouse at Buenos Ayres into which the coals could be transferred so as to preserve the master's lien; and therefore the master could not have got rid of his liability as carrier by landing them.

[BRETT, J. If the master landed the goods and placed them 236] in "an ordinary warehouse, the warehouseman would have a lien upon them for the warehouse rent. Would the master have a lien also?]

Clearly not: *Syeds v. Hay* ⁽¹⁾; *Somes v. British Empire Shipping Co.* ⁽²⁾. To preserve the ship-owner's lien there must be a continuance of the custody of the goods in him.

Holker, Q.C., and *Baylis*, in support of the rule. The ship-owner is bound to deal with the goods in a reasonable manner. He cannot retain them on board for an indefinite period, and then charge the consignee (or the consignor) with demurrage. In this case, supposing there was no public warehouse into which the coals could be landed, the master might have hired space in an ordinary warehouse and still retained his lien. This is quite in accordance with what is laid down in *Smith's Mercantile Law*, *Abbott on Shipping*, *Maclachlan on Shipping*, and in the judgment of *Willes, J.*, in *Meyerstein v. Barber* ⁽³⁾. The judge here in effect told the jury that the master could not take the coals out of the ship and still retain his lien. That clearly was a misdirection. It is not the landing the goods, but the parting with the possession of them, that destroys the lien. If the master delivers the goods to the consignee, or to any one who represents him, so that they have become at his risk, the lien is gone. The only difference which the statute makes is this, that, whereas formerly the shipowner might have preserved his lien by depositing the goods in a warehouse of his own, he would have done so at his own risk, he may now deposit them in a public warehouse without that risk.

[BRETT, J. In *Erichsen v. Barkworth* ⁽⁴⁾, *Crompton, J.*, says: "As to the not unloading after those days (the lay days) the jury would have to estimate the damage; and, if they found that there was any vexatious conduct on the part of the ship-owner, such as keeping the goods for his own benefit, they would give little damages. After the demurrage days, he cannot keep the goods for an unlimited time, and then sue for da

⁽¹⁾ 4 T. R., 260.

⁽²⁾ 8 H. L. C., 338; 30 L. J. (Q.B.), 229.

⁽³⁾ Law Rep., 2 C. P., 38.

⁽⁴⁾ 8 H. & N., 894; 28 L. J. (Ex.), 95.

mages." If the master cannot keep the goods, he must put them on shore.]

*The marginal clause here was no doubt introduced in [237 favor of the shipowners, to enable them to land the coals so that they should be at the risk of the consignees, and the lien be still preserved.

[BRETT, J. It enabled the master to land the goods at once. Your argument is, that it obliged him to do so.]

Assuming that contention not to be sustainable, still the direction was calculated to mislead the jury, and to induce them to give larger damages than they would otherwise have given. *Black v. Rose* ⁽¹⁾ is not very intelligible, and at all events does not decide this point.

[At the suggestion of the court, it was agreed that the rule should be discharged, the verdict being reduced by the 56*l.* given for the detention of the *Pitho* at Buenos Ayres.]

KEATING, J. The case having been summed up by my brother Brett to the jury in a way which could not be complained of, one of the jury asked him whether the captain could have discharged the cargo at the port of destination and still retain his lien for the freight. I must confess I should have thought that that question was intended to be put with reference to the circumstances which had been proved before the jury; and therefore, if the learned judge had simply answered it in the negative, I should have been of opinion that the answer was correct, because there was no evidence that there were any public warehouses at the ports in question. But the learned judge certainly appears to have used language which by possibility might have induced the jury to think that under no circumstances could the master have discharged the coal without losing his lien. I am disposed to think that that is too wide a proposition; because, whatever may be the law if the goods are landed and lodged in a general warehouse, whereby another and an independent lien might be given to the warehousekeeper, I think it is competent to the master to land the goods and still preserve his lien on them, by placing them in a warehouse over which he or the consignee of the ship has exclusive control. I am therefore indisposed to sustain the proposition of the learned judge to its full extent. What effect, *if any, it may [238 have had on the minds of the jury, it is impossible to say with certainty; that is matter of speculation only. Mr. Holker, no doubt, is justified in complaining of that part of the direction as affecting the damages: but I am fully persuaded that, if it affected the damages at all, it was only to a very small extent; and the parties have wisely, I think, agreed to a reduction of

(1) 2 Moore, P. C. (N.S.), 277.

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the verdict by a sum which in my judgment exceeds the amount by which the damages could possibly have been influenced by the mode in which the question of the juryman was answered. Under the circumstances, therefore, the rule will be discharged, the verdict being by consent reduced to 443*l.*, and each party paying his own costs of this rule.

GROVE, J. I am of the same opinion. It appeared to me when the rule was moved, and I have heard nothing to induce me to alter that impression, that it could not be law that under no circumstances could the master land the cargo without parting with his lien for freight. The authorities, as it seems to me, go only to this extent, that, if the goods are landed, they must, in order to preserve the lien, be so landed as to retain the master's be done. The answer of my brother Brett to the question put absolute and entire dominion over them, a thing which can rarely to him was qualified only by the supposition that there were public bonded warehouses at the port of discharge. But the doubt I entertain is as to the sense in which we ought to understand the question, after the way in which the learned judge had summed up the case. I strongly incline to think that all that was meant by the question was, whether, if the master lands the goods at an ordinary landing place, and puts them into an ordinary warehouse, he thereby parts with his lien. Undoubtedly, if the question was put in that sense, the answer would have been correct; and because the answer in its terms goes somewhat further, we are called upon to say that the question was not put in that sense. There is this further question, viz. whether, within the rule laid down in *Crease v. Barrett* ⁽¹⁾ and other cases, the court would grant a new trial where the misdirection has not conduced to a wrong verdict. In the present case I cannot possibly see that, if the alleged misdirection had 239] not taken place, the jury could *have reduced the damages by more than 56*l.* That, I think, is the maximum that can possibly be taken off.

BRETT, J. I am of opinion that the answer I gave to the question put to me by the juryman was wrong, because it included the case of the master landing the goods and depositing them in a warehouse where they would remain under his own control, and that it was incorrect to say that in such a case as that the master would lose his lien for freight. The point, as it seems to me, is by no means an easy one. This is a case in which the goods, when landed, would be landed in a port where the English statutes relating to public warehouses do not apply. There was no evidence as to what the foreign law was, and therefore the question is, what are the rights of a master at a port

(1) 1 C. M. & R., 919.

where there is no English warehousing statute in force and no evidence of any law different from the law of England. The authority of Crompton, J., in *Erichsen v. Barkworth* ⁽¹⁾, seems to me to show that there may be a case in which the master may land and yet retain his lien upon the goods; because that learned judge says that, even where the consignee has neglected to accept the goods,—and therefore where he must be assumed to be in fault,—the master cannot keep the goods on board his ship for an unreasonable time. What must he do with them then? It seems to me to follow that there must be some way of landing them by which his lien may be preserved; and I feel now clear that Crompton, J., had it in his mind that the master might land the goods and still preserve his lien for freight, if he kept them still entirely under his own exclusive control. The dictum of Willes, J., in *Meyerstein v. Barber* ⁽²⁾, seems to me to be to the same effect; and so also is the passage cited from Abbott on Shipping, because, if by “practice” he means the universal practice of merchants, it becomes, as it seems to me, part of the mercantile law. Whether the master can preserve his lien irrespectively of English statute-law as to public warehouses or of any foreign law equivalent thereto, by putting them into a warehouse belonging to a third person, is a question which it is not necessary for us now to decide. The difficulty which presents itself against the master’s retaining *his [240] lien in such a case seems to me to be this, that then another and an independent lien would exist; and I very much doubt whether, if the master were so to deposit the goods on shore as to give another person a lien upon them, he would not as a matter of course lose his own lien, even though such other person should undertake to the master not to deliver the goods to the consignee without being paid the master’s claim for freight. But it is not necessary to decide that upon this occasion. I therefore think that the answer which I gave to the question put to me was wrong in its terms. I think the proper answer would have been this,—“Under certain circumstances the master may do so; but there is no evidence that he could have done it in this case.” If that had been the answer given, I should have been prepared to maintain it; but the answer I did give was wrong, and likely to lead the jury to a wrong conclusion. I think it might have affected their verdict, though to a very small extent. Whether it could have affected it to the extent of 56% I doubt; because it does not by any means follow that, even if the master could have landed the goods so as to preserve his lien, he was bound to land them; and the jury would have had to consider whether under the circumstances of the

⁽¹⁾ 3 H. & N., 894; 28 L. J. (Ex.), 95.⁽²⁾ Law Rep., 2 C. P., 38.

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case he had acted unreasonably in keeping the goods on board for the time he did. Still, strictly speaking, the defendants would probably have been entitled to have the rule made absolute for a new trial; but they have very properly given way, and have thereby obtained the full amount of any difference which could have been caused by the misdirection. Under the circumstances, therefore, I entirely agree with the rest of the court that the verdict should be reduced to the sum agreed on, each party paying their own costs of this rule.

Rule discharged accordingly.

Attorneys for plaintiffs: *Gregory, Rowcliffes, & Rawle, for H. Forshaw & Hawkins, Liverpool.*

Attorneys for defendants: *Gregory, Rowcliffes, & Rawle, for Hull, Stone, & Fletcher, Liverpool.*

Where one is bound to protect another from a liability he is bound by the result of a litigation to which such other is a party, provided he have notice of the litigation and an opportunity to control and manage it. *Pake v. Smith*, 2 Abb., Court of Appeals, Dec. 76; *Mayor, etc. v. Troy, etc.*, 49 N. Y., 657; *Blasdale v. Babcock*, 1 Johns., 517; *Cooper v. Watson*, 10 Wend., 203; 2 Greenl. Ev., § 116; *Castle v. Noyes*, 14 New York, 332, 335; *Miner v. Clark*, 15 Wend., 425; *Del. Bank v. Jarvis*, 20 N. Y. Rep., 227; *Fay v. Ames*, 44 Barb., 327; *Beers v. Pinney*, 12 Wend., 309, 310; *White v. Madison*, 26 N. Y. Rep., 129; *Thomas v. Hubbell*, 18 Barb., 9; *Kettle v. Lipe*, 6 Barb., 467; *Wright v. Whiting*, 40 Barb., 235; *Howe v. Buffalo, &c.*, 38 Barb., 126; 37 New York, 297, 299; *Burt v. Devey*, 31 Barb., 540, reversed upon the question of amount of damages only, 40 N. Y., 283; *Hart v. Messenger*, 46 N. Y., 253, reversing 2 Lansing, 446.

And this though the litigation was in a foreign state. *Konitzky v. Meyer*, 40 N. Y., 571.

"If the vendor appears and defends, or if the vendee gives him notice so that he has the opportunity to do so, the judgment against the vendee is conclusive in an action by the latter against his vendor, on the implied warranty of title, although the vendor was no party to the action. And the rule is the same in regard to all persons who stand in such a relation to each other, that the matters determined in an action brought by a third person against one will necessarily again come in ques-

tion, in proceedings between him and the other, as vendors, grantees, sureties, persons acting under an agreement for an indemnity, and the like. It is not necessary that the parties should be the same, in the second action, or that they should occupy the same relative positions of plaintiff and defendant, as in the former action, or that the form of action should be the same. The test is whether the party against whom the former judgment is sought to be used was, or had an opportunity of being heard, and the matter litigated is the same, and the parties are in privity as to such matters." *Craig v. Wood*, 36 Barb., 383, and cases cited.

But if the party to the first litigation fail to give his principal notice, and judgment go against him by his own neglect to successfully defend the action, he is not entitled to recover from his principal the amount paid in satisfaction of the judgment, if his principal have a good defense to the original cause of action. *Barmon v. Lithauer*, 1 Abb., Court of Appeals, Dec. 99.

Otherwise if he have no defense, for then the party against whom the claim is made, or of whom property is claimed, may pay the claim or surrender the property without suit and recover his damages. *Bordwell v. Collins*, 45 N. Y., 494.

It is immaterial whether the former judgment was right or wrong. It is the duty of the party, to be bound, if wrong to have it reviewed and set right. *Howe v. Buffalo, &c.*, 38 Barb., 127, 37 New York, 297.

It has been held that if the party to be bound is sworn as a witness on behalf of his principal this is sufficient notice to him and he is bound by the judgment. *Barney v. Dewey*, 18 Johns., 224; *Brewster v. Countryman*, 12 Wend., 450; *Chicago city v. Robbins*, 2 Black, U.S. Rep., 423; 4 Wallace, 672-5; *Walker v. Ferrin*, 4 Verm., 523; *Carpenter v. Pier*, 30 Verm., 81; *Howe v. Buffalo, &c.*, 38 Barb., 126.

But the later cases hold the contrary. *Barmon v. Lithauer*, 1 Abb., Court of Appeals, Dec. 99.

It is not necessary the parties should be the same. *Castle v. Noyes*, 14 New York, 332, 335.

It is immaterial whether the plaintiff in the action to recover from the party to be bound by the litigation was plaintiff or defendant in the other. 13 Vermont, 379; *Fake v. Smith*, 2 Abb., Court of Appeals, Dec. 76.

A party who has notice of the pendency of a suit is bound by it. "The term 'parties' as thus used includes all who are directly interested in the subject matter, and who had the right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment." *Robbins v. City of Chicago*, 4 Wallace, 672-675; *Castle v. Noyes*, 14 New York, 332, 335; *Craig v. Ward*, 1 Abb., Court of Appeals, Dec. 454.

If the party bound to assume the prosecution or defense do so, his principal is bound to do no act to his prejudice in the action. *Kellogg v. Forsyth*, 24 How. U.S., 186.

If the party to be bound by a litigation decline to assume the same his principal is entitled to recover the costs and expenses thereof. *Fake v. Smith*,

2 Abb., Court of Appeals, Dec. 76; *Rickert v. Snyder*, 9 Wend., 416, 423; *Del. Bank v. Jarvis*, 20 N. Y. Rep., 226, 228, 230; *White v. Madison*, 26 N.Y. Rep., 117, 129; *Baxter v. Ryers*, 18 Barb., 267; 3 Pars. cont., 5th ed., 165 and note; Id., 212; Sedg. Dam., 165, Marg. p.; *Crisfield v. Storr*, 36 Maryland, 130; *Rolph v. Crouch*, L.R., 3 Excheq., 44.

Including costs paid to his own attorney. *Fake v. Smith*, 2 Abb., Court of Appeals, Dec. 76; *Howard v. Loggrove*, L.R., 3 Excheq., 43.

But if the prosecution or defense be voluntary and without notice to the principal he is not liable for the costs thereof. *Crisfield v. Storr*, 36 Maryland, 130.

Although in such case the judgment is admissible to prove the fact of an eviction. *Crisfield v. Storr*, 36 Maryland, 130.

Where the recovery is for money, only, in order to entitle the party seeking to recover the amount of the former recovery against him he must have paid such judgment or he can only recover nominal damages. *Burt v. Dewey*, 40 N. Y., 283; *Fake v. Smith*, 2 Abb., Court of Appeals, Dec. 81, 82; *Delaware Bank v. Jarvis*, 20 N.Y., 226; *Moak's Van Santvoord's Pl.*, 316, 473; but see *Stout v. Folger*, 34 Iowa, 71.

Otherwise where one is obliged to incur a liability to free himself from an illegal imprisonment and sues for damages on account of such a false imprisonment. *Pritchett v. Boevey*, 1 Compton and Meeson, 775; and see *Toll v. Alvord*, 64 Barb., 568.

Although if the judgment ousted him of property he could recover the value of that. *Bordwell v. Collie*, 45 N.Y., 494.

C A S E S
DETERMINED BY THE
 COURT OF COMMON PLEAS,
AND BY THE
 COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,
IN AND AFTER
 EASTER TERM, XXXVI VICTORIA.

[Law Reports, 8 Common Pleas, 322.]

April 22, 1873.

322] *NICHOLS APPELLANT; HALL RESPONDENT.

Contagious Diseases (animals) Act, 1869 (32 & 33 Vict. c. 70), s. 75—The Animals Order, 1871, s. 19—Neglect to give notice of Animals being diseased—Knowledge.

By the Animals Order, 1871, made by the Privy Council under the 75th section of the Contagious Diseases (animals) Act, 1869, it is provided that every person having in his possession or under his charge an animal affected with a contagious or infectious disease shall, "with all practicable speed, give notice to a police constable of the fact of the animal being so affected."

Held, that in order to convict the person in possession or charge of a diseased animal of an offense against the order, it must be proved that he was aware of the fact that the animal was diseased.

CASE stated by justices of Buckinghamshire under 20 & 21 Vict. c. 43, the facts of which were in substance as follows:

At the petty sessions holden at Newport Pagnell, in the county of Buckingham, on the 2d of October, 1872, an information which had been preferred by the respondent, an inspector 323] of police at *Newport Pagnell, against the appellant, a cattle dealer, came on for hearing. The information stated, that the appellant having in his possession certain animals, to wit five head of cattle affected with a contagious or infectious disorder called the foot and mouth disease, did neglect to give notice with all practicable speed to a police constable of the fact of the said animals being so affected, contrary to the provisions of the general order of the lords of the privy council relative to contagious and infectious diseases among animals. (1)

(1) The order relating to giving notice called the Animals Order, 1871, the notice of animals being diseased, is the 19th section of which provides as order of the 20th of December, 1871, follows: "Every person having in his

It was proved at the hearing, by the evidence of the respondent, that on the 3d of August last the respondent saw in a field in the occupation of the appellant five animals apparently suffering from the "foot and mouth complaint;" and that the appellant had not given any notice to the respondent that the said animals were so suffering. On the 7th of August, the animals, which still remained in the same field, were examined by a veterinary surgeon, and found to be suffering from foot and mouth disease.

It was contended on the part of the appellant, that before he could be convicted of the offense alleged, it must be proved that the said animals were so affected with the foot and mouth disease to his knowledge, and that there was no evidence adduced to prove that. ⁽¹⁾

The justices overruled the objection and convicted the appellant. It was stated in the case that the justices found as a fact that the animals were on the 7th of August in the possession of the appellant, *and that they were suffering with a [324 contagious or infectious disease called the foot and mouth disease, and that the justices held it unnecessary to prove that the appellant knew that the animals were so affected, but that there was no evidence before them to show that the appellant knew that the said animals were so affected until he was served with a summons for the alleged offense.

The question for the court was whether, in order to convict the appellant of the said offense it was sufficient to prove that the said animals were affected as aforesaid, and that the appellant did not give notice, without giving evidence that the appellant knew that they were so affected.

Graham (Raymond with him), for the appellant. The words "with all practicable speed" clearly show that the order contemplates knowledge on the part of the person offending. How can it be practicable that he should give notice before he knows?

He cited *Emmerton v. Matthews* ⁽²⁾; *Core v. James*. ⁽³⁾

possession, or under his charge, an animal (including a horse) affected with a contagious or infectious disease, shall observe the following rules:

"(1.) He shall, as far as practicable, keep such animal separate from animals not so affected.

"(2.) He shall, with all practicable speed, give notice to a police constable of the fact of the animal being so affected. Such police constable shall forthwith give notice thereof to the inspector of the local authority, who shall

forthwith report the same to the local authority, and (except in the case of foot and mouth disease) to the privy council."

⁽¹⁾ It was likewise contended, that there was no sufficient proof that notice had not been given of the fact of the animals being diseased; but it became unnecessary, as will be seen from the judgment, to deal with this point.

⁽²⁾ 7 H. & N., 586; 31 L. J. (Ex.), 189.

⁽³⁾ Law Rep., 7 Q. B., 155.

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[KEATING, J. It appears to me that on the case as stated we must take it that the appellant had no knowledge of the fact that the animals were affected.]

Merewether for the respondent. The object of the statute and order is to prevent the spread of cattle disease, and if the construction suggested on behalf of the appellant is correct the provision for that object will become, practically speaking, ineffective. It is extremely difficult to prove knowledge in such cases. A farmer has only to keep out of the way if he has beasts which are suspected, and neglect to avail himself of the means of knowledge, and he cannot be convicted. Suppose the farmer entrusts the care of the beasts to a bailiff and is not personally cognizant of anything concerning them—

[HONYMAN, J. Then the bailiff will be liable.]

In *Core v. James* (1) it was clearly the opinion of Lush, J., that if the servant had had guilty knowledge the master would have been liable; but there neither master nor servant knew. Here the only question intended to be submitted was whether 325] the mere *fact that the master was ignorant is sufficient to prevent there being any offense against the order by him. It is obvious that somebody in charge of the beasts must have known, since they were apparently suffering from the disease as early as the 3d of August.

[HONYMAN, J. The case says nothing about the knowledge of any bailiff or servant of the appellant. The master might, perhaps, be convicted for the guilty act of his bailiff. Possibly the justices might not have been far wrong if on the facts of the case they had found that the appellant did know that the beasts were affected, but they have not found knowledge in anybody. The bare point raised for us is, whether knowledge is a necessary ingredient in the offense.]

If it appears that the beasts were suffering from the disease, the person in possession ought to know that such was the fact, and is to be treated as knowing.

The words "as soon as practicable" only refer to such considerations as the distance of the farm from the place where the police constable may be stationed, and similar considerations; not to any question of knowledge.

[HONYMAN, J. Can you put a different construction on the words here from that which must be put on them in the previous part of the clause? Clearly the person in possession could not be bound to separate the diseased beasts from others until he knew they were diseased.]

If knowledge must be shown, a defendant may be entitled to say, though the beasts presented unusual symptoms, I did not

(1) Law Rep., 7 Q. B., 135.

absolutely know that they were suffering from foot and mouth disease, because the symptoms were also consistent with some other disorder which is very difficult to distinguish from foot and mouth disease, but which is not contagious; and endless difficulties and uncertainties would be thrown in the way of the working of the order.

KEATING, J. I am of opinion that this conviction must be quashed. The question submitted is whether, in order to convict the appellant, it was sufficient to prove that the animals were affected by a contagious disease, and that the appellant gave no notice of their being so affected without evidence [326 that he knew of their being so affected. The 75th section of the Contagious Diseases (animals) Act provides that the privy council may make such orders as they think expedient, for, among other purposes, "requiring notice of the appearance of any such disease among animals." And it is further provided by the 108d section, "if any person, acts in contravention of, or is guilty of any offense against this act, or any order made by the privy council in pursuance of the act," he shall be liable to a penalty not exceeding 20*l*. In pursuance of the 75th section, the privy council have made an order which directs that the person in possession or charge of the animals affected with any contagious disease shall "with all practicable speed," give notice of their being so affected. It must be taken on the case as stated that the appellant did not know that the animals in question were diseased. The magistrates are desirous of knowing whether the mere fact of the animals being diseased is sufficient to convict the person in possession of them or in whose field they were, even if he were not cognizant of the fact. I am of opinion that knowledge is an essential ingredient of the offense. I do not see how without knowledge a person can fairly be said to act in contravention of an order worded as the one now before us is. The provision is that notice is to be given "with all practicable speed." I cannot understand how, on any reasonable construction of these words, it can be said that a man can neglect to give notice with all practicable speed without knowledge of the fact of which he is to give notice. It has been contended on behalf of the respondent that the act is aimed at the prevention of a great public evil, and that if it is necessary to prove knowledge it will be difficult or impossible to give effect to its provisions, and many cases were suggested in which the statute and orders might be evaded. There are two answers to this argument. First, this is a penal enactment, and we are bound, according to a well established principle of interpretation, whatever the consequences, to construe it strictly. I do not deny that in construing the enactment we

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are entitled to take into consideration its object and the surrounding circumstances, but I do not find any such ambiguity in its terms as would entitle us to strain the language for the purpose *of giving effect to the alleged object. I am quite clear that the words of the order import the necessity of knowledge in order that there may be a contravention of it. I will not refer to the cases that have been cited at length. The case of *Core v. James* (¹), referred to by Mr. Graham, is, no doubt, in favor of the view that knowledge is essential, but I do not attach very much weight to that decision as an authority governing the present case, for it appears to me that each case of this sort must depend on the wording of the particular statute which may be applicable to it. Here, I think, no doubt can arise on the words of the order. Then, with regard to the supposed consequence of our decision, viz., the facility with which the order may be evaded, the answer is, that the lords of the privy council have it in their power under the act, to make what order they may think expedient. They can so frame their orders as to prevent all doubt on the subject and obviate the possibility of evasion: our duty is only to construe the order according to the plain import of the language used without regard to the consequences.

HONYMAN, J. I am of the same opinion. I do not think it is necessary to add anything to what has been said by my brother Keating with respect to the present case, but I just wish to say that it must not be supposed that I express any opinion on the question whether, if a farmer went away, leaving his business in charge of a bailiff or other servant, he might not be responsible if such servant knowingly omitted to give the required notice. That question is not raised by the case now before us.

Conviction quashed.

Attorney for appellant: *John Rogers, for Stimson.*

Attorneys for respondent: *King & McMillin, for Tindall & Baynes.*

[Law Reports, 8 Common Pleas, 328.]

April 25, 1873.

328] *CORNELL V. HAY. THE SAME V. MASSEY. THE SAME V. TORRENS.

Company — Prospectus — Companies Act, 1867 (30 & 31 Vict. c. 181), s. 38 -- Fraud — Non-disclosure of Contracts made by Promoters or Directors.

The 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 181), which provides for the disclosure in the prospectus of a company of certain particulars with

(¹) Law Rep., 7 Q.B., 135.

regard to the class of contracts specified in the section, is applicable only for the protection of shareholders in the company, and creates no statutory duty towards bondholders of the company or others for breach of which an action on the statute will lie:

Quære, as to the nature of the contracts to which the provision is applicable.

Semble, per Honyman, J., that the section creates no statutory cause of action, but merely amounts to a declaration that, as between shareholders and those issuing the prospectus, the latter shall be deemed to have acted fraudulently.

FIRST count of the declaration in the action against Hay stated that the defendant was a director of the Canadian Oil Works Corporation, limited, and before the issue of the said prospectus hereinafter mentioned the promoters of the said corporation had entered into a contract or contracts with the defendant and certain other persons that, in consideration of the defendant and the said persons consenting to allow their names to appear in the prospectus of the said corporation and otherwise as directors of the said corporation, the promoters would pay to the defendant and the said persons a large sum each in cash or fully paid up shares of the said corporation: that the said contract or contracts were not specified upon the prospectus of the said corporation, nor in any way mentioned therein; and the defendant knew of the said contract or contracts, and knowingly issued the said prospectus with the fraudulent intent to induce the plaintiff and others to take bonds of the said corporation. And the plaintiff took divers such bonds on the faith of the said prospectus, without having had notice of the said contract or contracts. And by reason of the aforesaid fraud of the defendant, the plaintiff has lost the value of the said bonds and has been otherwise damnified.

Pleas to the first count: 3. That the said contracts were not *subject to adoption by, or binding upon, the directors or [329. the said corporation.

4. That the said contracts were not contracts entered into by the said promoters, or the defendant, or the said other persons as agents for or on behalf of the said corporation, nor were they binding on or subject to adoption or ratification by the directors or the said corporation, or intended so to be.

5. That the plaintiff was not a person who took shares in the said corporation.

Demurrer to the 1st count of the declaration.

Demurrer to the 3d, 4th, and 5th pleas.

Joinders in demurrer.

The pleadings in the other two actions were substantially similar, except that the declaration was against Massey as a trustee of the company, not as a director. (1)

(1) The 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 181), enacts as follows: "Every prospectus of a company and every notice inviting
5 ENG. REP.] 39

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Sir J. D. Coleridge, A.G. (Reid with him), for the plaintiff in the respective actions :

The first count of the declarations in these actions discloses the breach of a statutory duty by the defendant, by which damage was caused to the plaintiff. The fact that the plaintiff is a bondholder, and not a shareholder, does not affect the right of action. The section is clearly divisible into two parts. The latter part, no doubt, contains a provision solely applicable to the case of shareholders, and provides that a certain specified effect shall follow from a breach of the duty created by the former part of the section in their case; but the former part taken alone is an enactment of an express statutory duty. Consequently, assuming the contract not disclosed to have been [330] within the section, the *defendants have clearly been guilty of an illegal act, and the plaintiff, being thereby injured, is entitled to sue as in the ordinary case of private damage resulting from breach of a statutory duty. The mischiefs intended to be guarded against clearly apply to the case of a bondholder as much as to that of a shareholder.

[HONYMAN, J. You must go the length of saying that not bondholders only could sue for breach of this duty, but any member of the public injured by its non-performance.]

Secondly, the contract not disclosed was clearly within the section. The intention was that contracts affecting the character and prospects of the company should be disclosed, so that all parties interested might have materials for judging of its position. It is not necessary that the contract should be made, or intended to be made, on behalf of the company. A private and collateral contract made by the promoters or directors, if it bears upon the position of the company, must be disclosed. It is obvious that it would be most material to anyone interested in the company to know that the names of persons of weight and experience on the prospectus were procured by payment of a sum of money.

Even, if the count be not good under the statute, it is a good count for a fraudulent representation at common law. [He cited *Atkinson v. Newcastle and Gateshead Waterworks Company* ⁽¹⁾; *Venezuela Railway Company v. Kisch* ⁽²⁾.]

persons to subscribe for shares in any joint-stock company shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors or trustees thereof before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall

be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

⁽¹⁾ Law Rep., 6 Ex. 404.

⁽²⁾ Law Rep., 2 H. L., 99.

Sir J. Karslake, Q.C. (*Holl* with him), for the defendant Hay.

H. James, Q.C. (*R. E. Turner* with him), for the defendant Massey.

R. V. Williams, for the defendant Torrens.

The section cannot be divided into two parts, as suggested, and is clearly meant to apply to the case of shareholders only. The construction contended for by the plaintiff is far too extensive, inasmuch as it would apply not to bondholders merely, but to any creditor of the company. It could not have been the intention to create a statutory duty so extensive as this. It is submitted that the section was never intended to give a right of action at law for breach of a statutory duty. It simply provides that, as between the company and shareholders a prospectus shall be deemed a fraud if it do not disclose a certain class of contracts. This was probably intended *to be [33] applicable to questions arising in equity on winding-up, with respect to placing persons on the list of contributories. In such cases, where there has been fraud, a person may be entitled to relief. The mere non-disclosure of the contract, even if fraudulent, is no cause of action, or ground of equitable relief *per se*. The party complaining must go on to show that he was thereby induced to take the shares, and has suffered injury, or ought not to be made responsible. Secondly, the contract not disclosed was not within the section. The section is not intended to apply to contracts made between promoters, or directors in their private capacity and others, though such contracts may be collaterally connected with the formation of the company. The contracts intended are contracts made by promoters, &c., as representing or on behalf of the company; not necessarily contracts to which the company is intended to be nominally a party, but contracts of which the burden would fall on the company, and which, in substance, though not in form, amount to contracts of the company. The 38th section must be read in connection with the immediately preceding section, which relates to contracts "on behalf of any company." The words, "whether subject to adoption or otherwise," would be insensible, unless this construction be correct. They are wholly inapplicable to contracts not made on behalf of the company, but affecting promoters, &c., only in their private capacity. The construction contended for by the plaintiff is obviously far too wide; for, according to it, every contract made by a promoter in his private capacity, in any way connected with the business of the company, must be disclosed: as, for instance, a contract with a printer, to pay for printing expenses incurred in getting up the company. The shareholder is entitled to know

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on what liability he embarks, but not the history of all the acts of the promoters. Thirdly, this is not a good count for a fraudulent representation at common law. It is obviously intended to be based on the statute, and the plaintiff ought not to be allowed now to treat it as based on the common law doctrine of fraud. The allegation that the prospectus was issued with fraudulent intent, must be treated as a mere allegation of law, and, unless the facts alleged show a fraud, cannot make the count good. It is essential that there should be an allegation [332] that the plaintiff was induced by the fraud to take *bonds in the company. It is submitted that there is no such allegation. It is alleged that the plaintiff took bonds on the faith of the prospectus. That is not equivalent to such an allegation; for it must amount to a statement, that if the contract had been disclosed, the plaintiff would not have taken the bonds. It is not alleged that anything stated in the prospectus was not perfectly true.

[HONYMAN, J. It might possibly be put, that the prospectus impliedly alleged that the defendants were *bonâ fide* directors; whereas, in truth they were mere sham directors, whose names had been procured by a sum of money.]

The count is not fairly capable of such a construction. The case of Massey differs from that of the other defendants with respect to the question of statutory liability, inasmuch as the section does not provide that the issuing of the prospectus shall be deemed fraudulent as against trustees, but only as against promoters, directors, and officers. A trustee is not an officer within the meaning of the section. He is not, as trustee, one of the executive officers engaged in the management of the company.

[They cited : *Heymann v. European Central Ry. Co.* (1); *Scott v. Lord Ebury* (2).]

The Attorney-General, in reply.

KEATING, J. I am of opinion that the declaration is bad. It is founded upon the 38th section of 30 & 31 Vict. c. 131. That section appears to me to be in its terms applicable only to persons taking shares in the company. I can see many reasons why the case of bondholders should come within the mischief intended to be guarded against in the case of shareholders, and, on the other hand, important distinctions may be suggested between the two classes; but at all events we are bound by the words of the section, and unless we can see our way to adopting the ingenious suggestion of the attorney-general, and divide the section into two distinct parts, reading the first part as containing a general prohibition in favor of the public at large, we cannot extend the provision beyond the case of shareholders. I

(1) Law Rep., 7 Eq., 154.

(2) Law Rep., 2 C. P., 255.

am of opinion that we cannot so construe the section; consequently, the plaintiff, who is not a *shareholder, but a [333] bondholder, cannot maintain this action. I do not wish to be understood as giving any countenance to the argument that the contract disclosed in this declaration is not a contract such as the directors would be bound to disclose by the prospectus under the section. It seems to me that its subject matter was such that a shareholder might reasonably be entitled to be made acquainted with it, and its non-disclosure appears to me to be within the mischief contemplated by the act. It was argued on a suggestion to that effect, thrown out by the court, that this declaration might be construed as a good count for a common law misrepresentation. I am disposed to think it is not so; but, at all events, I think it is not such a count, considered as a count for fraudulent representation, as the defendant ought to be made to go down to trial upon. Therefore, if the defendant applied to us, as, under these circumstances, he probably will, to proceed under the 52d section of 15 & 16 Vict. c. 76, on the ground that the count was embarrassing, we should certainly deem it our duty to strike it out, or compel the plaintiff to amend, so as to cure defects of ambiguity, which, if they do not amount to ground of general demurrer, are in a high degree calculated to embarrass.

The view we have taken of the case renders it unnecessary to deal with the arguments that have been put forward with respect to the general intention of the legislature in passing this section. It is unnecessary to decide whether, as Sir John Karslake and Mr. Williams suggested, it was intended merely to have relation to proceedings in equity, as to placing parties upon the list of contributories. We are not called upon to express an opinion on that point in the present case, inasmuch as the plaintiff is not a shareholder, and in our opinion the section only applies to shareholders.

HONYMAN, J. I am of the same opinion. With respect to the question whether this count is good, considered as based on the statute, I am of opinion that the section is not intended to give a statutory cause of action at all. It seems to me that, taking the whole of the section together, it amounts simply to a provision that, as between certain parties, a prospectus which does not reveal a certain class of contracts shall be deemed fraudulent. Such a *prospectus would not *per se* give a right [334] of action at law or a claim to relief in equity. The party complaining must go on in equity, for instance, to show that he had not so dealt with his shares, as to deprive him of the right to relief, and at law that he was induced by the fraud to take the shares. I am also of opinion that the section cannot be read

in two distinct parts, as suggested on behalf of the plaintiff. It never could have been intended to give so extensive a right of action as that contended for against anyone publishing a prospectus within the terms of the section. The case of *Atkinson v. Newcastle and Gateshead Waterworks Company* ⁽¹⁾, which was cited by the attorney-general, is not really analogous, because in that case there were two wholly distinct enactments. In the view I take it is unnecessary to decide whether we shall adopt the construction of the section for which Mr. Williams so ably contended, namely, that the contracts intended by the section are only contracts made, or intended to be made, on behalf of the company; but I wish for my own part to say that I am not, as at present advised, prepared to adopt that construction. I cannot think it is a matter of indifference to the shareholders what contracts were entered into by promoters in their private capacity relating to the formation of the company. It is obvious that it may be of vital importance to them to know of such contracts in forming a correct judgment as to the position of the company. It might obviously make a very great difference if the names of persons who appeared on the prospectus as interested in or connected with the company were mere dummies, and such persons really had no stake in the concern at all. Whatever the construction of the statute may be with respect to the points to which I have alluded, I am clearly of opinion that the declaration is bad, on the ground that the plaintiff, not being a shareholder, is not within the section. The legislature might, perhaps, if it had occurred to them, have very reasonably extended the provisions of the section to bondholders; but they have not done so; shareholders only are mentioned. The section, if meant to include bondholders, would have run "every prospectus or every notice inviting persons to 335] subscribe for shares or bonds." In Massey's *case I think the declaration is bad, on the additional ground that he is only a trustee of the company; and there is no provision in the section, as it seems to me, that the prospectus shall be deemed fraudulent as against a trustee, for I do not think a trustee comes within the meaning of the word "officer." With respect to the suggestion that this count may be construed as a good count at common law, I am disposed at present to agree with my brother Keating in thinking it bad, though I am not without doubts on the subject; but I quite concur in thinking that it is such a count as the defendant would be entitled to have struck out as embarrassing on application to that effect. I cannot conceive anything more likely to prove embarrassing than to be discussing at *nisi prius* the exact meaning of the alle-

(1) Law Rep., 6 Ex., 404.

gations of this count, considered as a count for fraudulent misrepresentation.

[The counsel for the defendants thereupon applied to the court to strike out the count, and the counsel for the plaintiff for leave to amend, and the court ordered that the count should be struck out, unless within fourteen days the plaintiffs should amend; the costs of the argument of the demurrers and amendment, if any, to be defendants' costs in any event.]

Judgment accordingly.

Attorney for plaintiff: *Webb.*

Attorney for defendant Hay: *Sydney Gedge.*

Attorneys for defendant Massey: *J. & R. Gole.*

Attorney for defendant Torrens: *H. W. Vallance.*

[Law Reports, 8 Common Pleas, 336.]

April 28, 1873.

***MORDUE V. THE DEAN AND CHAPTER OF DURHAM. [336]**

Conveyance of Land subject to Reservation of Mines and Mining Powers — Compensation to Grantee for Exercise of Powers reserved — Mode of Assessment — What damage the subject of Compensation.

A conveyance of land in fee was made subject to a reservation to the grantors of mines and minerals, and extensive powers of occupying and using the surface for the purpose of working the same. It was provided thereby that it should not be lawful for the grantee to do or suffer anything to be done whereby the grantor should be prevented, hindered, or obstructed in the exercise of the powers reserved, and also that the grantors should make to the grantee annually reasonable compensation for damage or spoil of ground to be occasioned by the exercise of the reserved powers. Previously to the date of the deed of conveyance the premises were leased to the grantee, subject to similar reservations to those in the conveyance, and workings already existed which had taken place under such reservations.

Held, that no restriction was placed by the words of the conveyance on the use by the grantee of the land for any purpose to which it was applicable so long as he did not touch or interfere with the minerals, and the compensation for damage or spoil of ground occasioned by the exercise of the powers reserved must be estimated with reference to the value of the land for any purpose to which an ordinary owner might put it; and that compensation was due in respect of damage arising from the use subsequently to the conveyance of land included therein that had been previously occupied and used for mining purposes, but not in respect of the mere existence of workings in being at the time of the deed, or their subsequent user without any fresh damage.

SPECIAL case stated by an umpire under an agreement for arbitration, of which the facts were in substance as follows: By indenture of lease dated the 21st of July, 1856, the defendants demised lands for the term of twenty-one years to certain persons jointly, to hold the same with certain reservations of the

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woods and mines upon and under such lands, and powers for working the same, paying compensation for damage or spoil of ground occasioned thereby to the lessees. This lease was assigned to the plaintiff in July, 1859.

By an indenture of the 10th of September, 1859, the reversion in fee of the hereditaments and premises comprised in the lease was granted to plaintiff. In this last mentioned indenture were contained the following exceptions and reservations from the grant thereby made, that is to say: "save and except and always reserved out of these presents and the grant and confirmation thereby *made, or intended so to be, to the said dean and chapter, their successors and assigns, all mines, pits, quarries, seams and beds of coal, stone, clay, lead, and other minerals and substances whatsoever, whether opened or unopened, in, within, or under the said hereditaments and premises, and also full and free liberty of access, ingress, egress, and regress, to and for the said dean and chapter, their successors, &c., from time to time, and at all times hereafter, with or without horses, &c., to enter into, upon, through, or over all or any of the said lands, &c., using and occupying so much of the said lands, &c., as shall be necessary or proper for having access, and winning, and getting, and carrying away, and, if desired, of converting, manufacturing, or otherwise disposing of the said mines, minerals, &c., and particularly full and free liberty, power, and authority to have, take, and occupy sufficient land for agents or workmen's houses, pit, and heap room, furnaces, engines, and engine houses, and other like conveniences."

There were also provisions that the defendants should be entitled to make drains and watercourses, and to form roads, and to make cuttings, embankments, bridges, tunnels, or other works, through the lands conveyed, and to lay down iron rails and other materials for the purpose of using such roads, and to erect and have any engine houses, station houses, or other erections, or any depots or yards or other conveniences, and to haul and carry goods, coals, and other minerals and substances on any such roads or ways with any engine, and in any manner whatsoever. And also that the defendants and their successors, &c., should have full power to do any and every act for the purpose of the foregoing exceptions, or any of them, in, upon, over, under, or with respect to the said lands, that they could have done had they been and continued the sole and absolute owners of the fee simple in possession thereof, and that the rights, liberties, matters, and things thereinbefore excepted and reserved or regranted should be taken and considered as commencing as and from the day before the date of these presents, and should be taken to be to the absolute and entire exclusion of

the said Joseph Mordue, his heirs, &c., from the right of using or exercising, or of granting and permitting any other person or persons to use or exercise any of the same in or upon, over, across, through, or under, or in respect of the said lands, and that it should *³³⁸ not be lawful for the said Joseph Mordue, his heirs or assigns, or any person or persons claiming, or to claim, by, from, through, or under him or them, to make, do, or commit, or suffer to be done or committed, any act, matter, or thing whatsoever, whereby or in consequence whereof the said dean and chapter, &c., should be in any way prevented from or interrupted, hindered, obstructed, or injured in the free and undisturbed use, exercise, or enjoyment of the same, or any of them: provided always, that the said dean and chapter and their successors, &c., shall pay to the said Joseph Mordue, his heirs, &c., annually, reasonable compensation for damage or spoil of ground to be occasioned by the exercise of all or any of the powers, liberties, and privileges expressed and reserved, such annual compensation, as often as any cause for the same shall have arisen, if the parties cannot agree, to be determined by the adjudication of two indifferent persons, to be chosen from time to time one by each party, or by an umpire to be chosen by such two indifferent persons.” Mr. Joseph Anderson, as lessee under the defendants, and under the provisions and authorities granted or demised to him under and by virtue of an indenture of lease dated the 25th of May, 1864, or otherwise by the license, authority, and permission of the said defendants, had exercised over divers parts of the lands comprised in the indenture of the 10th of September, 1859, the rights, easements, and authorities, or some of them reserved by the said last mentioned deed. At the time of that deed’s execution there was upon the land an old pit-shaft which had been abandoned in 1856, the buildings in connection therewith being taken down. A dispute having arisen with regard to the compensation to be paid to plaintiff under the deed of 1859, and having been referred to arbitration, it was contended before the umpire on behalf of the plaintiff that so far as regards the land used and occupied under the reservations in the deed the compensation to which the plaintiff was entitled was the marketable annual value of the lands for any purpose for which the lands were applicable, and that as regards other parts of the plaintiff’s land not used or occupied, but which were damaged by severance or otherwise by the use and occupation of the part used and occupied, the plaintiff was entitled to the amount by which their marketable annual value was diminished. It was *con- [339 tended on behalf of the defendants that the plaintiff was not entitled to have the compensation assessed on the above principles;

and further, that he was not entitled to compensation as to some parts of the land in respect of which he claimed compensation.

The opinion of the court was asked by the umpire upon the following questions :

1. Whether the compensation for damage or spoil of ground was to be inclusive of ground occupied by pits which were open and existing at the time of the execution of the deed of conveyance of the 10th of September, 1859 ?

2. If exclusive of ground occupied by such pits, whether such ground was to be inclusive or exclusive of grounds used or occupied at the time of the execution of the said deed with and for the necessary purposes of such pits ?

3. Whether the compensation for damage or spoil of ground was to be inclusive or exclusive of ground which at the time of the execution of the deed was used or occupied for having access to, or getting or carrying away, or converting, manufacturing, or otherwise disposing of the excepted minerals and premises, or any other minerals or substances, or for agents' or workmen's houses, or for pit or heap room, furnaces, or engine houses, or other like conveniences.

4. Whether the compensation for damage or spoil of ground was to be inclusive or exclusive of ground which at any time after the execution of the said deed might be used or occupied for the purposes mentioned in the preceding questions, or any of them.

5. Whether the compensation for damage or spoil of ground (to whatever it was applicable) was to be estimated with reference to the value of the ground, if usable only for the purposes for which it was used at the time of the execution of the said deed, or with reference to its value, if usable for building or any other purposes to which it was applicable, or with reference to its value as subject to any restrictions necessarily imposed upon its use by the provisions of the said deed, or on what other principle.

6. Whether the plaintiff was restricted by the provisions of the said deed from using the land for any purposes which would substantially add to the surface weight to be supported from below.

340] *7. Whether the plaintiff was restricted by the provisions of the said deed from using the land for any purpose for which it could not be used without interfering with the minerals or other substances excepted and reserved by the said deed, or with the powers thereby excepted and reserved for working or getting the said minerals or substances.

8. Whether the restrictions referred to in the two last preceding questions, or either of them, or any other restriction

necessarily imposed upon the use of the land by the provisions of the said deed, ought to be taken into consideration in estimating the damage or spoil of ground, and how, and upon what principle.

Herschell, Q.C. (*Wood Hill* with him), for the plaintiff. The compensation for damage or spoil of land caused by the exercise of the powers reserved must be assessed with reference to the value of the land for any purpose to which it may be applicable. The defendants contend that the effect of the clause in the conveyance which forbids any interference by the grantee with the exercise of the reserved powers is to restrict the plaintiff from putting the land to any use inconsistent with its use for mining purposes. The argument clearly goes too far. This would prevent the plaintiff from erecting any building, however temporary its character, upon the land; or from using it for any purpose but agriculture, for which purpose, considering the nature of its surroundings, it might probably have no value. Upon this principle there would be no compensation at all due, for the land would be of no value to the grantee. The meaning is, that when they think fit the defendants may use the land for mining purposes, and the plaintiff is not to interfere with or prevent such use of it; but the defendants must make compensation according to the ordinary marketable value of the land.

A question will be raised as to whether compensation is to be made in respect of pits open at the time of the conveyance.

With respect to the old unused pit, it must be admitted that as to the mere existence of that, while it continues unused no compensation is due.

With respect to damage caused by the subsequent working of pits open at the date of the conveyance, or by the subsequent user *of lands then already occupied for mining purposes, [34] compensation is clearly due. [He cited *Duke of Buccleuch v. Wakefield*. (1)]

Kemplay, Q.C. (*Haselfoot* with him), for the defendants. It is contended that there is no compensation to be made in respect of damage arising from the use of pits open at the date of the conveyance, and from the accessories necessary to the working of them. The plaintiff took the land subject to the right to use them. With respect to the basis upon which compensation is to be assessed, it is submitted that, looking to the provisions of the deed, it was obviously never intended that the grantee should be entitled to alter the condition and character of the land in a manner inconsistent with mining operations; as, for example, to burden the surface of the land with buildings, so that mining would be impossible without letting them down.

(1) Law Rep., 4 H. L., 377.

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The powers reserved are so extensive, and the restrictions so widely expressed, that it was clearly intended that the surface should remain substantially unaltered. The value of the land must, therefore, be estimated with reference to the restrictions put upon its user, and not as though it were applicable to any purpose. [He cited *Bell v. Wilson* ⁽¹⁾; *Rowbotham v. Wilson* ⁽²⁾; *Hext v. Gill* ⁽³⁾; *Caledonian Railway Company v. Spratt* ⁽⁴⁾; *Shafte v. Johnson* ⁽⁵⁾; *Smith v. Darby* ⁽⁶⁾; *Eaton v. Jeffcock* ⁽⁷⁾; *Smith v. Thackerah*. ⁽⁸⁾]

Herschell, Q.C., in reply. The only restriction imposed on the grantee is, that he is not in any way to touch or interfere with the minerals, and so far as any purpose is concerned for which the land could not be used without doing so, that must be considered in estimating the compensation; but the restriction cannot have the sweeping construction contended for. The grantors can only restrict or prevent the plaintiff's use of the land for any purpose to which it is applicable without actual interference with the minerals upon payment of compensation.

BOVILL, C.J. There may be some difficulty with respect to 342] the *particular expressions used in some of the clauses of the conveyance upon the construction of which the present case must depend, but the general effect of the language seems to be that the property in the soil is to pass to the plaintiff with the exception of the minerals, which are to remain in the defendants, the dean and chapter of Durham.

It is a conveyance of the soil and buildings thereon to the plaintiff in the condition in which they then existed, and it appears to me that the plaintiff thereby acquired all the ordinary rights of an owner of freehold property, subject to such rights as were expressly reserved or re-granted to the dean and chapter. The reservation is in substance one of all minerals with complete powers of getting and working them, and of erecting buildings, machinery, and such other works as might be necessary for those purposes, and these powers relate not only to pits thereafter to be opened, but to pits already open.

The plaintiff, by an express provision of the deed, is absolutely excluded from using or exercising any of the rights vested in the dean and chapter with respect to the enjoyment of the minerals. There is also a general clause which prevents the plaintiff from interfering with the exercise of the powers reserved to the dean and chapter, and if this clause were to be construed according to the widest interpretation of the words

⁽¹⁾ 2 Dr. & Sm., 395; Law Rep., 1 Ch., 308; 84 L. J. (Ch.), 572.

⁽²⁾ 8 H. L. C., 348; 30 L. J. (Q.B.), 49.

⁽³⁾ Law Rep., 7 Ch., 699.

⁽⁴⁾ 2 Macq., 449.

⁽⁵⁾ 8 B. & S., 252, n.

⁽⁶⁾ Law Rep., 7 Q. B., 716.

⁽⁷⁾ Law Rep., 7 Ex., 379.

⁽⁸⁾ Law Rep., 1 C. P., 564.

employed, as contended for on behalf of the defendants, there is hardly an act which could be done by the plaintiff in the exercise of the ordinary rights of an owner with respect to the land which might not in one sense be a hindering or interrupting of the exercise of the powers reserved.

But I am of opinion that this clause must receive a reasonable interpretation, taking into consideration the general objects of the conveyance; and that it must be taken to refer to any actual interference with the powers reserved at the time when it may be sought to exercise them, and not to be intended to prevent the ordinary use of the land by the plaintiff as owner of the freehold. The exercise of the rights reserved to the dean and chapter is made subject to a provision for compensation to the plaintiff for damage or spoil of ground which may be occasioned by the exercise of all or any of the powers reserved, to be ascertained from time to time, as occasion may arise, by arbitration. On the whole *it appears to me that under the provisions [343 of this deed the plaintiff, as purchaser of the reversion, had a right to use the land in any way which he might think fit, provided he did not touch or interfere with the minerals: to build on it, or put it to any other purpose for which it might be suitable; that the powers given to the defendants do not in any way amount to restrictions on the ordinary rights of the plaintiff as owner, and that, therefore, the compensation is to be assessed on the principle that there are no such restrictions. A question was raised with respect to an old pit shaft existing at the date of the conveyance, and with respect to that I am of opinion that no compensation could be claimed for its mere continuance in existence, but that if it were used afresh and damage resulted therefrom, or if new buildings were erected, tramways laid down, or workmen's cottages built in connection therewith, to all these new workings the compensation clause would apply. With respect to the basis upon which the compensation is to be assessed, I am of opinion that it must be assessed according to the marketable annual value of the land with reference to the purposes to which these lands might reasonably be applicable. And I think that the plaintiff is entitled to compensation not only in respect of the land actually taken or used in the exercise of the reserved powers, but also of the damage occasioned to parts of the land not taken by severance or otherwise.

To apply the principles already laid down to the various questions put to us: with respect to the first and second questions, I am of opinion that the plaintiff is not entitled to compensation in respect of the mere existence of the old pits or damage already occasioned thereby at the date of the deed, but for future damage which may be occasioned thereby he is entitled.

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I am also of opinion that he would be entitled to compensation in respect of any land that has been or that may hereafter be used as accessorial to the working of such pits, not having been so used at the time of the execution of the deed. In answer to the third question, I am of opinion that the plaintiff is entitled to compensation in the case of lands which had been already used or occupied for the purposes enumerated prior to the execution of the deed, in respect of the damage occasioned by the use of such lands, if any, for such purposes subsequent to the 344] *execution of the deed. For what existed at the date of the deed, and for the subsequent user without any fresh damage, I think no compensation can be given. With respect to the fourth question, the defendants themselves admit that the question must be answered in the affirmative. With respect to the fifth question, I am of opinion that the compensation is to be assessed with reference to the value of the land for any purpose to which it might be reasonably considered as applicable, without any restriction being considered as imposed by the terms of the deed. I think as regards the sixth question, that no restriction is imposed on the plaintiff's building on the land, although the surface weight to be supported from below might be thereby increased. Such seems to me to be the true construction of the deed taking the view of it which I do; and I am supported in that conclusion by the decisions which have been referred to. With regard to the seventh question, I am of opinion that the plaintiff is not restricted from using the land in any way, except that he may not take or touch the minerals themselves. And with regard to the eighth question, I think that the provisions of the deed in favor of the defendants ought not to be taken into consideration for the purpose of diminishing the amount of the compensation, excepting only in respect of the minerals themselves, for which, as being excepted out of the conveyance, the plaintiff is entitled to no compensation.

GROVE, J. I am of the same opinion. Some of the questions asked of us seem to be somewhat difficult to answer as mere matters of law, and are rather questions for the arbitrator in assessing the amount of the compensation. I do not suppose any arbitrator would assess the value of this land as being capable of being used for a gentleman's mansion or park. He would look to some extent to the nature of the land as it actually existed at the time of the assessment of compensation, and so far there would be some diminution of value; but he ought not, I think, to take into consideration, in estimating its value, prospective deterioration of value to the extent which might be occasioned by the exercise of the powers reserved by the dean and chapter. This would be an incorrect mode of estimating

the compensation, for if the powers were not exercised the purchaser would have the benefit of the land *for any purpose to which it might be applicable; and if they are exercised, by the terms of the deed he is to be entitled to compensation for any damage occasioned thereby. [345]

DENMAN, J., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *Williamson, Hill, & Co.*

Attorney for defendants: *J. G. Watson, for Richardson Peck.*

[Law Reports, 8 Common Pleas, 345.]

May 8, 1873.

BAYLIS v. LINTOTT.

Practice — Costs — County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5 — "Action founded on Contract."

In an action against a hackney carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage, the declaration alleged that in consideration that the plaintiff would with her luggage become a passenger in such carriage, and of certain reward to be paid to the defendant by the plaintiff in that behalf, the defendant promised to carry the plaintiff and her luggage safely, and that the defendant not regarding his duty as hackney carriage proprietor nor his said promise did not safely carry the plaintiff's luggage, but so carelessly and negligently conducted himself that part of the said luggage was lost. The plaintiff having recovered the sum of 20*l.* in the action:

Held, that she was deprived of costs by the County Courts Act, 1867, s. 5, the cause of action as set forth in the declaration being founded on contract.

Tattan v. Great Western Ry. Co. (2 E. & E. 844; 29 L. J. (Q.B.), 184) discussed.

THIS was an application for a rule to tax the costs of the action under the following circumstances.

The declaration in substance stated that the defendant was the proprietor of a certain hackney carriage, which said hackney carriage was at the time, &c., under the care, management, and direction of defendant's servant, and plying for hire within the limits of the Metropolitan police district, and thereupon, and after the passing of the act of parliament made and passed in the seventh year of her present Majesty, entitled "An act for regulating hackney and stage carriages in and near London," the plaintiff, at the request of the defendant, hired the said hackney carriage of the defendant to convey and carry the plaintiff and her luggage *from and to certain specified [346] places, and thereupon, in consideration of the premises, and that the plaintiff, together with her said luggage, would, at the request of the defendant, become and be a passenger to be carried and conveyed in the said hackney carriage as aforesaid, and of certain reward to the defendant in that behalf, he the defendant

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as and being such proprietor of the said hackney carriage as aforesaid, then promised the plaintiff to convey her and her said luggage safely and securely from and to the places specified, and accepted her and her said luggage to be so carried; but the defendant, not regarding his duty as such proprietor of the said hackney carriage as aforesaid, or his said promise, did not nor would carry or convey the plaintiff and her said luggage safely and securely, but so carelessly and negligently behaved and conducted himself by his said servant in that behalf in and about the premises, that by and through the mere carelessness, negligence, and improper conduct of the defendant by his said servant, and not otherwise, part of the plaintiff's said luggage became and was wholly lost to the plaintiff. Plea: payment into court of 15*l*. Replication that 15*l*. was not sufficient. The plaintiff at the trial obtained a verdict for 5*l*. above the amount paid into court, and the question therefore arose whether the plaintiff having recovered a sum not exceeding 20*l*. was deprived of costs by virtue of the County Courts Act, 1867 (30 & 31 Vict. c. 142) s. 5.

Kydd, in moving for a rule *nisi*, contended that the action must be considered as founded on tort. The case of *Tuttan v. Great Western Ry. Co.* (¹) decided, with reference to the question of costs, that an action against a common carrier for not safely delivering goods is an action of tort founded on the custom of the realm, and not one of contract. It is submitted that the position of a hackney carriage proprietor with respect to the luggage of persons hiring his carriage is that of a common carrier. The declaration must be treated as one in tort; the statement in the declaration of the contract is mere inducement, showing the facts from which the duty arose; the cause of action is the breach of duty.

347] *BOVILL, C.J. I think there should be no rule. The provisions of the County Courts Act, 30 & 31 Vict. c. 142, s. 5, deprive the plaintiff of costs if he does not recover a sum exceeding 20*l*. in actions founded on contract, or 10*l*. in actions founded on tort. The defendant paid into court the sum of 15*l*., and the jury awarded the further sum of 5*l*., so that in the whole the sum recovered did not exceed 20*l*. The question thus arises whether the present action is founded on contract within the meaning of the section. On looking to the form of the declaration, it appears to me clear that the cause of action therein alleged is one founded on contract. In many cases previous to the introduction of the present rules of pleading it became material to consider, with a view to preventing misjoinder of counts, whether a count could be framed in case

(¹) 2 E. & E., 844; 29 L.J. (Q.B.), 184.

instead of assumpsit. And it was a common practice to treat causes of action founded on contract as actions of tort, and to frame declarations alleging a contract and a duty arising therefrom, and complaining of a breach of such duty by neglect to perform the contract. Here the contract alleged in the declaration would be implied by law on the hire of the carriage, and the cause of action is therefore rightly put as founded on the contract. In the case of *Tattan v. Great Western Ry. Co.* ⁽¹⁾, which was cited, the Queen's Bench treated the cause of action as one founded on tort; but the lord chief justice expressed his regret at the anomalous state of the law, by which an opinion being given to the plaintiff to sue in either form, the right to costs depended merely on the form of the declaration. It is sufficient to say with regard to that case, that the court considered the form of declaration to amount to case and not contract. There was no statement there of any promise or consideration as in this case; but the cause of action was founded wholly on the breach of duty. The case is therefore clearly distinguishable from the present, inasmuch as it proceeds on the precise character of the cause of action as alleged in the declaration, which was wholly different from that in the present case. In the case of *Legge v. Tucker* ⁽²⁾, where the action was against a livery stable keeper for negligence in the case of a horse, the court thought that the *cause of action was [348 founded on contract. This decision preceded that of *Tattan v. Great Western Ry. Co.* ⁽¹⁾, and though it appears to have been cited, the court in delivering their judgment made no observations upon it. Since both those decisions the case of *Morgan v. Ravey* ⁽³⁾ was decided. In that case an innkeeper's executors were sued for the not keeping securely the property of a traveler, and with reference to the difference between their liability in cases of tort and contract, it became necessary to consider whether the action was founded on tort or contract, and it was considered that it was founded on contract, and the executors were therefore held liable. Mr. Bullen, in his excellent work on Pleading 3d ed. p. 121, states that the question of costs depends on the substance of the thing, not on mere matter of form. Pollock, C. B., says, in delivering the considered judgment of the court in *Morgan v. Ravey* ⁽⁴⁾: "We think that the cases have established that where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him." Looking to those authori-

⁽¹⁾ 2 E. & E., 844; 29 L. J. (Q.B.), 184.

⁽²⁾ 1 H. & N., 500; 26 L. J., (Ex.), 71.

⁽³⁾ 6 H. & N., 265; 30 L. J. (Ex.), 181.

⁽⁴⁾ 6 H. & N., at p. 276.

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ties, if it were now necessary to consider the case of *Tattan v. Great Western Ry. Co.* ⁽¹⁾, and to decide upon what seems to amount to a conflict of authority, I should be disposed to adopt the decisions of the Court of Exchequer and the principles on which they are based, but it is not necessary to do in this case, inasmuch as it is distinguishable from *Tattan v. Great Western Ry. Co.*, ⁽¹⁾ on the form of the declaration.

KEATING, J. I am of the same opinion. I do not pronounce any opinion on the question whether the decision in *Tattan v. Great Western Ry. Co.* ⁽¹⁾ is right or not, for I think that case is distinguishable from the present. There the declaration was against a common carrier on the custom of the realm, here a promise is alleged and a breach of such promise. It seems to me that the cause of action here is plainly founded on a contract within the meaning of the section.

349] *HONYMAN, J. I am of the same opinion. There are many actions against carriers and other parties in which the declaration may be framed either in tort or contract. The distinction between the two was very material in former days. The rule is thus laid down by Tindal, C.J., in *Boorman v. Brown* ⁽²⁾: "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which nevertheless the remedy for the breach or non-performance is indifferently either assumpsit or case upon tort is not disputed; such as actions against attorneys, surgeons and other professional men, for want of proper skill or proper care in the service they undertake to render; actions against common carriers, against shipowners on bills of lading, against bailees of different descriptions, and numerous other instances occur in which the action is brought in tort or in contract at the election of the plaintiff." The decisions on the right to costs in such cases do not appear to be very easily reconcilable. It does not seem altogether satisfactory that the plaintiff should by declaring in one particular form rather than another alter the liability of the defendant in respect of costs, but many of the authorities seem to show that he may do so. In this case, however, the form of the declaration in my opinion is clearly that of a declaration in contract. The duty alleged is alleged as proceeding from the contract between the parties. The plaintiff having chosen so to frame the cause of action cannot now, it appears to me, turn round and say that for the purposes of costs the cause of action is based on tort. As regards the decision in *Tattan v. Great Western Ry. Co.* ⁽¹⁾ and the other decisions that have been referred to, I pronounce no opinion as which we ought to follow if it were necessary to de-

⁽¹⁾ 2 E. & E., 844: 29 L. J. (Q.B.), 184. ⁽²⁾ 3 Q. B., 516.

cide between them. It is clear on consideration of the former case that the declaration there was a declaration on the case, and the present case is therefore distinguishable. *Rule refused.*

Attorney for plaintiff: *Craven.*

[Law Reports, 8 Common Pleas, 350.]

May 8, 1873.

*SMITH V. BAKER.

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Trover — Bill of Sale void as against Trustee of Bankrupt's Estate — Sale of Goods under — Proceedings under Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 72, by Trustee to recover Proceeds of Sale — Waiver of Tort.

The trustee of a bankrupt's estate applied, under the 72d section of the Bankruptcy Act, 1869, to the Court of Bankruptcy to declare a bill of sale, made by the bankrupt previously to his bankruptcy, fraudulent and void as against himself as trustee, and to order the assignee under the bill of sale who had previously to the bankruptcy sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Court of Bankruptcy having made the order prayed for, and the assignee having accordingly paid over the proceeds of the sale:

Held, that the trustee could not afterwards bring an action of trover against the assignee under the bill of sale to recover the difference between the value of the goods and the amount realized by the sale, inasmuch as by the proceedings in bankruptcy to recover the proceeds of the sale he had affirmed such sale and waived the tort.

DECLARATION by the plaintiff as trustee of the property of William Dale, a bankrupt, for a conversion of the goods of the plaintiff as such trustee.

Pleas. 1, Not guilty; 2, Not possessed.

3. That the alleged conversion was the sale by the defendant, on the 4th of November, 1871, for the sum of 179*l.* 18*s.* 6*d.*, of certain goods comprised in and sold under a bill of sale dated the 4th day of March, 1871, and being the goods in the declaration mentioned, and the plaintiff as and being the trustee of the property of the said William Dale gave notice to the defendant on the 7th day of March, 1872, that the County Court of Gloucestershire, holden at Bristol, being the court having jurisdiction in the matter of the bankruptcy of the said William Dale, and wherein bankruptcy proceedings therein were then pending, would be moved on the 15th day of March, 1872, on behalf of the plaintiff, for an order that the said bill of sale might be declared to be fraudulent and void as against the plaintiff as such trustee, and the defendant might be ordered to pay over to the plaintiff, as such trustee, all the moneys realized by the sale of such of the goods comprised in the said bill of sale as had been sold, and to deliver to the said plaintiff,

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351] as such trustee, such of the said goods as *might still remain unsold, and on the said 15th day of March, 1872, the said County Court was moved accordingly, and did declare and order that the said bill of sale was fraudulent and void as against the plaintiff, and that the defendant should pay the sum of 179*l.* 18*s.* 6*d.*, the gross amount realized thereunder, to the plaintiff, and the defendant accordingly did pay the said sum, which was the gross amount realized under the said bill of sale, to the plaintiff, and the defendant says that no goods remained unsold under the said bill of sale, and the said sum was all that has ever been realized thereunder, and the plaintiff accepted and received the said sum in full satisfaction of all the goods comprised in and sold under the said bill of sale, and of the proceeds thereof, and of all his claim in respect thereof, and of the cause of action herein pleaded to, and the plaintiff thereby before suit waived and abandoned all his claim and cause of action in respect of the alleged wrongful conversion, and discharged the defendant therefrom.

Issues.

At the trial which took place before Mellor, J., at the last Bristol summer assizes, the facts were as follows: The defendant was the assignee under a bill of sale of furniture and other effects of William Dale, and, default having been made in the payment of the debt secured by the bill of sale, had sold the goods comprised therein as stated in the 3d plea on the 4th of November, 1871. On the 10th of November, 1871, Dale was adjudicated a bankrupt. On the 7th of March, 1872, the plaintiff's attorney gave notice to the defendant that the County Court of Bristol, being the court in which the bankruptcy proceedings were pending, would be moved for an order that the bill of sale might be declared fraudulent and void as against the plaintiff as trustee, and the defendant might be ordered to pay over to the plaintiff all the moneys realized by the sale of such of the goods comprised in the said bill of sale as had been sold by him, and to deliver up such of the same goods as might still remain unsold, and to pay the costs of the said motion. The plaintiff made an affidavit in support of the motion in the County Court setting out the facts connected with the making the bill of sale and the sale of the goods, and stating that though he had 352] *demanded of the defendant payment of the moneys produced by the sale the defendant declined to pay him the same. The County Court, on the 15th of March, 1872, made an order declaring the bill of sale fraudulent and void as against the plaintiff, and ordering that the defendant should pay the sum of 179*l.* 18*s.* 6*d.*, the gross amount realized thereunder, to the plaintiff. The amount so ordered to be paid was afterwards

reduced to 157*l.* 6*s.*, the difference being the amount of rent due to the landlord of bankrupt's premises, and the reduced amount was paid over by the defendant to the plaintiff.

It was not denied that the bill of sale was void as against the plaintiff, but it was contended on behalf of the defendant that the plaintiff could not maintain trover after having applied for and obtained the proceeds of the sale of the goods under the bill of sale.

The verdict was entered for the plaintiff, the damages to be subsequently assessed, if necessary, and leave was reserved to move to enter a nonsuit, the court having power to draw inferences of fact.

A rule *nisi* had been obtained accordingly.

Lopes, Q.C., and *Saunders*, showed cause. It must be admitted that if the proceedings in the Court of Bankruptcy were equivalent to recovery in an action for money had and received, the plaintiff must be taken to have waived the tort, and cannot now maintain trover. It is contended that they were not so equivalent.

[They were then stopped by an intimation from the court that they wished to hear the counsel in support of the rule, and that they should be heard further, if necessary, in reply.]

Cole, Q.C., and *Arthur Charles*, supported the rule. The plaintiff has waived the tort by his acts, and cannot now maintain trover. He can only be entitled to the proceeds of the sale on the footing that the defendant acted as his agent in selling the goods. Having received those, he cannot now say the sale was tortious *Smith v. Hodson* ⁽¹⁾; *Brewer v. Sparrow* ⁽²⁾. *Burn v. Morris* ⁽³⁾ *is distinguishable from the present case on the [353 same grounds as those upon which it was distinguishable from *Brewer v. Sparrow* ⁽²⁾.

[BOVILL, C.J. Would receipt of the proceeds of a wrongful sale always waive the tort? Is it not rather a question of fact to be considered with relation to the circumstances of each case, whether there has been what amounts to an election to affirm the wrongful act?]

Admitting that it is a mixed question of law and fact, it is well settled upon all the authorities, that bringing an action for money had and received is a conclusive election to affirm the sale, inasmuch as it necessarily involves a recognition of the defendant as the plaintiff's agent in committing the tortious act: *Smith v. Hodson* ⁽¹⁾. It is submitted that the claim and recovery of the proceeds of the sale under s. 72 of the Bankruptcy Act, 1869, is exactly analogous to an action for money had and re-

(¹) 2 Sm. L. C., 6th ed., 119.

(²) 7 B. & C., 810.

(³) 4 Tyr., 485.

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ceived. The Court of Bankruptcy is given a very wide jurisdiction by that section. It may apply any remedy which the justice of the case demands, for the purpose of a proper distribution of the estate. By demanding and recovering the proceeds of the sale in a judicial proceeding, the plaintiff irrevocably elects to waive the tort. It is submitted that even if the proceedings were not equivalent to an action for money had and received, as a matter of fact the evidence of an intention to affirm the transaction and consequent waiver of the tort is amply sufficient.

[BOVILL, C.J. The plaintiff expressly repudiates the transaction, and claims to have the bill of sale declared fraudulent and void.]

The same reasoning would apply in the case of the action for money had and received to recover the proceeds of the sale. The first step in such a case is to show that the bill of sale is fraudulent and void, but then the tort is waived, and the plaintiff treats the defendant as his agent. The plaintiff disaffirms the bill of sale but not the sale itself.

The plaintiff might have brought trover for the goods; he might have proceeded in equity, or he might have claimed the full value of the goods in the Bankruptcy Court and not merely the proceeds of the sale. Having elected to proceed in the Bank-354] *ruptcy Court for the proceedings only, he cannot harass the defendant by further proceedings at law. [They also cited *Wison v. Povler* ⁽¹⁾; *Lythgoe v. Vernon* ⁽²⁾; *Heilbut v. Nevill* ⁽³⁾; *Marks v. Feldman* ⁽⁴⁾; *Valpy v. Saunders* ⁽⁵⁾.]

Lopes, Q.C., in reply. The real question is, whether the plaintiff can be considered as having intended to treat the defendant as his agent in making the sale. It would be impossible on a reasonable view of what he did to come to the conclusion that he did. He repudiated the transaction from the first, and claimed to have the bill of sale declared fraudulent and void. The trustee is entitled to go to the Court of Bankruptcy and claim the proceeds of the sale for the purpose of protecting the creditors. The proceeds form portion of the estate, being derived from goods which were assets applicable to the payment of the bankrupt's debts. If the proceeds could not be claimed on behalf of the creditors, they might be dissipated or disposed of leaving only the right of action against the tortfeasor without any security for the creditors.

It is not putting a fair construction on the transaction to conclude that the receipt of the proceeds under these circumstances

(1) 2 Str., 859.

(2) 5 H. & N., 180; 29 L.J. (Ex.), 164.

(3) Law Rep., 5 C. P., 478.

(4) Law Rep., 5 Q. B., 275.

(5) 5 C. B., 867; 17 L. J. (C. P.), 242.

involved the abandonment of the right of the trustee to go for the difference between the proceeds and the real value of the goods by way of damages for the wrongful conversion. The proceeds are received merely in part of the value of the goods for which the defendant is responsible. The proceedings in bankruptcy are not equivalent to an action for money had and received. The reasoning applicable to the two cases is different. It would obviously be unjust that after bringing an action for money had and received, which involves the assumption that the plaintiff authorized the sale, the plaintiff should bring a fresh action of trover. [He cited *Morris v. Robinson* ^(*).]

BOVILL, C.J. The question in this case is, whether there has been what amounts to an adoption of the wrongful act of the defendant by the plaintiff, whereby the plaintiff has waived his right *to sue for the tort. The defendant took possession [355 of the goods, and sold them under a bill of sale, which was void as against the plaintiff as trustee of the bankrupt's estate. As between the bankrupt and the defendant the bill of sale was perfectly good, and the defendant had a right at the time of the sale to sell the goods subject to the possibility of the subsequent avoidance of the transaction in the event of a bankruptcy. The debtor almost immediately after the sale became bankrupt, and the plaintiff having determined, as trustee, to avoid the bill of sale, adopted proceedings in bankruptcy to make the defendant responsible for his act. The plaintiff was then at liberty to treat the sale as a tortious act, and to demand from the defendant the value of the goods and any damages resulting to the bankrupt's estate from such tortious act. He did not, however, commence any action at law for the tort, but resorted to the Court of Bankruptcy and made a successful application to have the bill of sale declared void. He further applied that the proceeds of the sale and any goods remaining unsold might be handed over to him, and obtained payment of the proceeds from the defendant; and the question now raised is as to the effect of his so acting. The law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so and bring his action for money had and received for the proceeds of goods wrongfully sold. The law implies, under such circumstances, a promise on the part of the tortfeasor that he will pay over the proceeds of the sale to the rightful owner. But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way. The principles which govern the subject are very well illustrated in

(*) 8 B. & C., 196.

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the case of *Buckland v. Johnson* ⁽¹⁾, where it is held that the plaintiff having sued one of two joint tortfeasors in tort could not afterwards sue the other for money had and received. There may be other instances where an act may amount to a conclusive election in point of law to waive the tort. But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act.

356] *In such cases the question whether the tort has been waived becomes rather a matter of fact than of law. Now it is contended in the present case that the proceedings in bankruptcy are equivalent to an action for money had and received. The language of the 72d section of the Bankruptcy Act, 1869, is very wide. Power is thereby given to the Court of Bankruptcy to decide all questions which the court may deem it necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any case of bankruptcy. If the defendant be right in his contention that the proceedings taken amounted to an action for money had and received, then clearly they form a bar to this action. If not, then the question is, what is the proper inference, treating the question as one of fact, as I am at present disposed to think that it ought to be treated, for us to draw from the plaintiff's proceedings as to whether there was a waiver or adoption of the tortious act of the defendant by the plaintiff. In treating the question as a matter of fact, of course we must be guided by the decisions on analogous cases as to what constitutes the waiver of a tort, but attention has been fully directed to all the authorities, and on consideration of the whole of the circumstances of the case I come to the conclusion, as a matter of fact, there was an affirmance of the act of selling the goods by the claim and receipt of the proceeds of the sale from the defendant, and that the plaintiff having therefore waived the tort cannot now maintain this action. The rule must, therefore, be made absolute.

KEATING, J. I am of the same opinion. It is admitted by the plaintiff's counsel, that if the plaintiff had brought an action for money had and received, that would amount to a conclusive election to waive the tort. That admission brings the whole question to the short point whether the proceedings that were taken in bankruptcy were equivalent to an action for money had and received. It appears to me that they were. The plaintiff claimed the proceeds of the sale in a judicial proceeding before a court having full jurisdiction to entertain and decide all questions arising out of the transaction. The order for which he applied was made, and he took advantage of it, and received

(1) 15 C.B., 145; 23 L.J. (C.P.), 204.

the proceeds of the sale. It seems to me that what he did is substantially equivalent to *recovering the proceeds by [357 an action for money had and received, which it is admitted would be a conclusive election to waive the tort. But bringing an action for money had and received is not the only way in which a tortious sale may be affirmed; and even if the proceedings in bankruptcy cannot be correctly regarded as equivalent to an action for money had and received, still I fully agree with my lords that, treating the question as a matter of fact, there was, on the facts of this case, a clear affirmance of the wrongful sale. In some of the cases cited it was held that a claim to the proceeds of a wrongful sale and receipt of them might amount to affirmance of the sale. Here we have these and additional circumstances pointing in the same direction.

HONYMAN, J. I also think the rule should be made absolute. As to the general rule of law there is no dispute. A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage. It is admitted, that if the proceedings in bankruptcy were equivalent to an action for money had and received, trover would not lie, for the only footing on which the plaintiff can recover in an action for money had and received is by waiving the tort and treating the defendant as his agent. The question therefore is, whether these proceedings were equivalent to such an action. The widest jurisdiction is conferred on the Court of Bankruptcy by the 72d section of the Bankruptcy Act, 1869; and we find that the plaintiff resorted to that court, and, instead of claiming the value of the goods, claimed and received the proceeds of the sale, to which he could only be entitled on the footing that the defendant acted as his agent in selling. It seems to me that he thereby elected to take to the sale, and cannot now turn round and seek to treat it as a conversion of the goods. *Rule absolute.*

Attorney for plaintiff: *Dix.*

Attorneys for defendants: *Gregory, Rowcliffes, & Rawle, for Benson & Elletson.*

C A S E S
DETERMINED BY THE
COURT OF EXCHEQUER,
AND BY THE
COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,
IN AND AFTER
HILARY TERM, XXXVI VICTORIA.

[Law Reports, 8 Exchequer, 135.]

Feb. 13, 1873.

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*DIXON v. BIRCH.

Innkeeper — Hotel Company — Holder of License.

The plaintiff having lost his goods at a hotel, of which a company were proprietors, sought to recover their value in an action against the paid manager, in whose name the justices' license had been granted:

Held, that the company were the real "innkeepers;" and, therefore, that the action was not maintainable.

THIS was an action to recover the value of certain goods of the plaintiff stolen from him at the Clifton Arms and Pier Hotel, Liverpool.

At the trial before Lush, J., at the Liverpool Winter Assizes, 1872, it was proved that the defendant was the manager of the hotel in question for the "Clifton Arms and Pier Hotel Company, Limited," at a salary of 15*l.* per annum. The license was in her name; and her name, as well as that of the company, was painted over the front door. She managed the ordinary domestic business of the establishment. The company's name was printed on the top of the bills made out for the various customers, and all the property in the house was theirs. The plaintiff's loss amounted to 21*l.* The learned judge was of opinion that the company were the real "innkeepers," and directed a nonsuit, with leave to move to enter a verdict for the plaintiff for 21*l.* if the court should be of opinion that the defendant was liable. A rule *nisi* was obtained accordingly, against which

Temple, Q. C., and *Sims*, showed cause. The defendant was a mere servant, and the real innkeepers were the company.

The only possible ground of liability is, that the license, which the justices, under 9 Geo. 4, c. 61, must grant to some particular individual, is in the name of the defendant. But this cannot impose upon her any liability as an innkeeper. She is the nominee of the company; and, except for revenue purposes, cannot be said to keep the inn.

[They referred to Bacon's Abr. Tit. "Inn," and to the definition of "Inn" in 26 & 27 Vict. c. 41, s. 4.]

Herschell, Q.C., and *Tomlinson*, in support of the rule. The *company keep the inn through the agency of the defend- [136 ant, who, as being the holder of the license, must be considered the real innkeeper. She would clearly be indictable herself for any offenses against the tenor of the license, although merely a paid servant. But if she be the "innkeeper" as regards one sort of liability, why is she not also the innkeeper as regards all other sorts? It may be said her liability as licensee is statutory, but there can be no difference between statutory and common law duties. She may have to account for all profits to another, but she "keeps the inn:" *Brooker v. Wood* (*); *Milligan v. Webb*. (?)

MARTIN, B. I think the ruling of the learned judge was correct. The defendant was only the manager of the hotel company, who were the real innkeepers. The circumstance that the license was taken out in her name does not, in my opinion, alter her position; and there is nothing in the licensing acts which prevents it from being shown that the real "innkeeper" is not the person licensed, but some one else.

PIGOTT, B. I am of the same opinion. The company kept this hotel in fact. Their name was over the door and on the billheads. The defendant, no doubt, for the purposes of the revenue, was in one sense the keeper of the inn; the license was in her name. But this fact is quite beside the question of who was the real innkeeper for all other purposes.

POLLOCK, B. I also think the rule should be discharged. The case ought to be considered quite apart from the licensing acts. Those were passed for purely fiscal purposes; they cannot alter the position of the parties, nor turn an agent or servant into a principal. In this case the defendant was the paid manager of the company, and certainly would not be liable at common law; and the licensing acts in no way extend her liability.

Rule discharged.

Attorney for plaintiff: *Barnard*.

Attorneys for defendant: *Torr, Janeway, & Tagart*.

(*) 5 B. & Ad., 1052.

(*) 12 Ad. & E., 787.

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Wright v. Midland Railway Co.

[Law Reports, 8 Exchequer, 137.]

Jan. 30, 1878.

137] *WRIGHT V. THE MIDLAND RAILWAY COMPANY.

Negligence—Railway Company—Liability of one Company for Negligence of Another with Running Powers—Parliamentary Agreement as to Traffic.

The N. Company had statutory authority to run over a portion of the defendants' line, paying a certain toll to the defendants. The signals at the point of junction between the two lines were under the control of the defendants. Owing to the servants of the N. Company negligently disobeying these signals, a train of the N. Company ran into a train of the defendants in which the plaintiff was, causing him damage. There was no negligence on the part of any of the defendants' servants. In an action for injuries sustained, brought by the plaintiff against the defendants:

Held, that he was not entitled to recover.

Great Western Ry. Co. v. Blake (7 H. & N. 987); *Thomas v. Rhymney Ry. Co.* (Law Rep. 5 Q. B., 226; Law Rep., 3 Q. B., 266), considered and distinguished.

Declaration (in the ordinary form), against the defendants for negligence in the management of a train in which the plaintiff was a passenger. Plea, Not guilty. Issue.

The cause was tried before Cleasby, B., at the Yorkshire Summer Assizes, 1872, when the following facts were proved: The plaintiff was a passenger on the 29th of August, 1871, by the defendants' railway from Leeds to Sheffield. About 400 yards from the defendants' station at Leeds a line belonging to the London and North Western Railway Company joins the defendants' line, over which, for a short distance, the London and North Western Company have running and other powers under the provisions of the Leeds New Railway Station Act, 1865 (28 & 29 Vict. c. cclxvii.). By that act, after reciting that the making of a new railway station on the south-east side of the Wellington station of the Midland Railway Company at Leeds, with lines to connect such new station and with existing proposed railways there, would be of public advantage, and that it was expedient that the North Eastern and London and North Western Railway Companies should be authorized to make the new station and the connecting lines, and that the defendants should be empowered to enter into the arrangements thereafter specified, it was amongst other things enacted (s. 13) that the companies might make the new station and connecting lines, and that the station and lines should be part of the undertaking [38] of those *companies respectively; and (s. 39) that the companies might pass over, and use with their engines and carriages, those portions of railway belonging to the Midland Railway Company which might be necessary in order to get access to and from the several junctions from and to the intended station, paying to the Midland Company the sums provided by

the agreement scheduled to the act, and that the Midland Company should perform upon such portions of their railway and premises all such services and duties as might be necessary or reasonable for the convenient conduct of the traffic of the companies over the same. The agreement scheduled provided for the payment to the Midland Company of a mileage toll for the use of their lines.

At the junction of the lines of the Midland and North Western Companies is a signal box, under the management of a servant of the defendants. Upon the occasion of the accident for which this action was brought, the signalman had set the signal in favor of the defendants' train, and against any train approaching the junction on the North Western line. The train in which the plaintiff was, proceeded, in obedience to the signals, along the portion of the line over which both companies had power to run, and whilst upon it was run into by a North Western train which was driven by persons who had negligently disregarded the signals. Injuries were sustained by the plaintiff in consequence. The jury found that the defendants had been guilty of no negligence, and that the collision was occasioned by the negligence of the servants of the London and North Western Railway Company; and a verdict was entered for the defendants, with leave to move to enter the verdict for the plaintiff for a sum contingently assessed by the jury, if the court should be of opinion that the defendants were responsible. A rule was obtained accordingly, in Michaelmas Term, 1872.

Digby Seymour, Q.C., and *Barker*, showed cause. The jury have found that there was no negligence in the defendants' servants, and the circumstance that under the Act (28 & 29 Vict. c. cclxxvii.) the London and North Western Railway Company could run over a portion of the defendants' line cannot make them responsible for the negligence of the servants of the last mentioned company, who *although they use the line under a [139 statutory arrangement, nevertheless use it as a public highway. In *Great Western Ry. Co. v. Blake* (*) the defendants' company ran by agreement over parts of the South Wales Railway, and were held responsible to Blake, because, having undertaken to carry him safely from one place to another, the fact of the line where the collision happened not belonging to them did not excuse them. They were bound, under their contract, to see the plaintiff safely through his journey, and their contract extended not only to lines in their exclusive possession, but also to lines over which they ran under agreement with other companies who also used them. *Thomas v. Rhymney Ry. Co.* (2) was decided on similar grounds.

(*) 7 H. & N., 987; 81 L.J., (Ex.), 346.

(2) Law Rep., 5 Q.B., 226; Law Rep., 6 Q.B., 226.

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There the defendants had running powers at the place where the accident occurred, over the lines of the Taff Vale Company, and were held to have contracted that neither they nor the other company would be guilty of negligence. In the present case the accident happened on the defendants' own line through the negligence of a company with running powers over it. On principle the defendants ought not to be liable for the other company's acts, and the authorities referred to, although the judgments contain *dicta* favorable to the plaintiff, are not directly in point, and ought not to be extended. The defendants are, no doubt, bound to see that their line and carriages, &c., are in a fit and proper condition for carrying their passengers, but there their duty ends.

Field, Q.C., and *Forbes*, in support of the rule. The cases of *Muschamp v. Lancashire & Preston Ry. Co.* (1); *Great Western Ry. Co. v. Blake* (2); *Readhead v. Midland Ry. Co.* (3); and *Thomas v. Rhymney Ry. Co.* (4), establish the principle that a railway company contracting to carry either goods or passengers from one point to another are bound to use reasonable care themselves, and, further, to see that all other persons lawfully using their line use reasonable care. If in the present case the North Western Company had negligently left a carriage or other obstruction on the defendants' line, the defendants would have been liable if an accident had happened through one of their [40] trains coming into collision with it; *and this though they themselves had been guilty of no negligence. Where is the difference between the case of the defendants' train running into a North Western carriage, and a North Western carriage running into the defendants' train? The obligation on the defendants is to keep the line clear, and the particular mode in which it becomes dangerous is immaterial. Unless the defendants are liable, the plaintiff would have no remedy at all, for there was no contract between the North Western Company and him. It may be conceded that the defendants would not be responsible for the acts of a mere trespasser, but in the present case the act causing the damage was done by persons with a right to use the defendants' line under act of parliament.

[They also cited *John v. Bacon* (5); *Daniel v. Metropolitan Ry. Co.* (6).]

BRAMWELL, B. I am of opinion that this rule should be discharged. The facts are simply these. The defendants undertook to carry the plaintiff from Leeds to Sheffield. While he

(1) 8 M. & W., 421.

(2) 7 H. & N. 987; 31 L. J. (Ex.), 346.

(3) Law Rep., 2 Q.B., 412; Law Rep., 4 Q.B., 379.

(4) Law Rep., 5 Q.B., 226; Law Rep., 6 Q.B., 266.

(5) Law Rep., 5 C. P., 437.

(6) Law Rep., 5 H.L., 45.

was performing the journey, upon their own line, there being no negligence of any sort upon their part, either as owners of the line, or carriers, or otherwise, the train of the London and North Western Company, through the negligence of the servants of that company, ran into the defendants' train, and so injured the plaintiff. The act that did the damage was solely and exclusively the act of the North Western Company. Now why, under those circumstances, should the defendants be liable? If this had been the case of goods they would have been liable, because they are then insurers; but here the duty of the defendants, according to the decided cases, is this: they enter into a contract that all persons connected with the carrying and with the means and appliances of the carrying, with the carriages, the road, the signalling, and otherwise, shall use care and diligence, so that no accident shall happen. But they contract no farther. If they were to contract that everybody should use care and diligence, their duty would extend to strangers. But it is conceded that they have no such duty as that. They have no contract or duty that strangers to the railway (if one may use such *an expression) shall do nothing [141] wrong either by willfulness or negligence, but it is said that they have a sort of intermediate obligation which is more than that all who are engaged in the carrying shall use care and diligence, but less than that all mankind shall use care and diligence, and not be guilty of wrong: a sort of obligation that all persons who have occasion, and who lawfully may use the line, shall not be guilty of any negligence or misconduct. Where is the authority for that proposition? In reason and upon principle how is it justified at all? It is said to be a very convenient thing that the plaintiff should be able to sue those undertaking to carry him, and should not be driven to inquire who it was that injured him, and bring his action against that person. But that is really an argument that it is very convenient to be unjust. Why there should be some duty extending beyond all those engaged in the carrying, and yet not including all mankind, I cannot see, either in reason or upon principle.

Now one word about the authorities. The first case quoted was *Great Western Ry Co. v. Blake*.⁽¹⁾ That decision appears to me to have proceeded upon the grounds particularly expressed in the judgments of Cockburn, C. J. and Crompton, J., from which I gather that the court considered that the defendants undertook to carry the plaintiff over the South Wales Railway, and therefore they undertook that the South Wales Railway Company's lines should be in a fit condition for the conveyance of the plaintiff. I will not say that I see nothing

(¹) 6 H. & N., 987; 31 L. J. (Ex.), 346.

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unreasonable in that, but I see nothing so unreasonable in it as, at all events, the proposition of the plaintiff upon the present occasion would be. This seems to me a plausible way of putting the case: "You have undertaken to take me to this place; I care not by what means you do it. You are going to take me by a certain railway belonging partly to yourselves and partly to others. On your own railway you would be bound to take due and reasonable care that it shall be in a fit and proper condition to convey me, so therefore you ought to undertake that the other railway over which you carry me shall be, and of which I know nothing at all." I say I think that is a plausible proposition, and I will not cavil at it. It is decided, and one ought not, without one is satisfied that the opinion expressed [42] is wrong, *to say that it is so. The South Wales Railway was not in fact in a fit condition for the carriage of the plaintiff, because somebody who was the servant of the South Wales Railway Company had put a carriage there, and the South Wales Company's servants had left it there. Therefore if the defendants had undertaken that the whole line should be in a fit condition, their contract had not been performed. Similar reasoning will apply to the case of *Thomas v. Rhymney Ry. Co.* (¹), and more especially when it is remembered that in that case the departure of the defendants' train from the Taff Vale Station depended upon certain information which they could get there, which information was to be given to them for their guidance, and for want of which information the accident happened. Therefore it may well be said that there was neglect in certain persons whom the Rhymney Company employed, to give them notice whether their train should go on or not. And although the case was not one of master and servant, it may well be that the Taff Vale porter and the station officials were the agents of the Rhymney Company in such a sense as to make the defendants responsible for their misdeeds. At all events, if these persons did nothing, which was the case when they did not tell the defendants they ought not to go on, the defendants were in this situation that nobody had done that which ought to have been done before they started on their forward journey. It seems to me, therefore, that those two cases prove nothing more than what I have said, namely, that if in the carrying of the passenger, including therein road, engines, carriages, signalling, and so on, there shall be any negligence from which damage may accrue to the passenger, the company are liable. But here there is nothing of the sort. This act of the North Western Company is not negligence which related to the plaintiff being carried at all; it was done while he was being carried

(¹) Law Rep., 5 Q. B., 226; Law Rep., 6 Q. B., 266.

it is true, but it had nothing to do with his being carried. It was done by the North Western Company for their own purposes in a matter not connected with the carrying of the plaintiff. It was not a negligent act which made the road unsafe, nor the carriage or engine unsafe, or the signals wrong, but done outside of the carrying (if I may use the expression) and which caused damage to the plaintiff *while he was being [143] carried. It is admitted that if the London and North Western Company had been trespassers, this action would not be maintainable, but it is said that because they had a right to be there, there is some obligation on the part of the defendants with relation to them which makes the defendants liable. Now I think there is such an obligation, but only to this extent, that the defendants are bound to use due and reasonable care that the London and North Western Railway Company shall not run into them, and shall do nothing to make the road or the defendants' carriages unsafe. But the defendants did their duty in this. For they signalled to the London and North Western train not to come on, and I think if the defendants' engine driver could have seen that the London and North Western train was coming on, and could have stopped before coming into collision with it, he ought to have done so.

But the argument is not only that there is some duty with regard to the user of the line by the London and North Western Company, but also that the London and North Western Company shall not be negligent. I protest that I cannot see the reason of that. Suppose, for example, they had crossed upon a bridge of their own over the defendants' line, and by their negligence the bridge had broken down, and so damaged the Midland Company's trains; would there have been any liability? Certainly not. And what is the difference between the principle in that case and this?

Then Mr. Forbes puts this case. He says, supposing a carriage had been left by the North Western Company on the railway; that would be a nonfeasance, and there would be no liability upon the part of the defendants, because they did not put it there, and no liability upon the part of the North Western Company because there is no privity. I dissent from both propositions. If it had been left by the North Western Company upon the line it would have been the duty of the defendants to have got it out of the way, and if they had not done so they would not have had the line in the condition in which it ought to have been. The case would then have been the same as *Great Western Ry. Co. v. Blake* (1) because the undertaking is

(1) 7 H. & N., 987; 31 L. J. (Ex.), 346.

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that the line should be in a fit condition for the passage of the plaintiff.

[44] But, further, I disagree with Mr. Forbes in his other proposition. It would be a misfeasance on the part of the North Western Company to place on the line an obstruction endangering the passage of travelers along it. Indeed it might be an indictable offense. I think, therefore, in the case put, the plaintiff would have had an action against the North Western Company, although there was no privity, and upon the authority of *Great Western Ry. Co. v. Blake* (!) he would have had an action against the defendants.

A striking remark was made by my brother Cleasby that a railroad is a public highway and people may use it. I know they do not, and I know practically they cannot, and that is why running powers are obtained; but still it is a public highway upon which everybody, with properly arranged engines and so forth, has a right to go. What would happen if anybody using the line in that way had under those powers done this thing? Would any liability attach to the defendants? They are liable as carriers, and yet, looking to the illustration put by my brother Cleasby, they would be liable simply because somebody else, having the right to use the same road had run into them. If that is so, it would follow, that if an omnibus ran into a cab the cab proprietor would be liable for the damage done.

It seems to me, therefore, that, in the reason of the thing, this is a plain case, and I do not think that any of the authorities have created any difficulty in the way of our decision. This rule must accordingly be discharged.

CLEASBY, B. I also think that we may discharge this rule without in any way coming into conflict with any of the decided cases.

I quite agree that a contract for carriage from one place to another extends over the whole journey whether upon the line of the contracting company or not, and, further, that it is the carrier's duty to use due and reasonable care during the whole journey. And I think that due and reasonable care extends to everything that is made use of by the contracting party during the course of that journey. For instance, as regards the construction of a railway, it embraces a contract that the rails themselves shall be in a sound and efficient state, so far as due care [45] can make them so, and if they were worn *out on a part of the railway not belonging to the contracting company, and which therefore they had not the power to repair, I agree that the decisions would establish that they would be liable for a want of care in those rails not being in a proper state if any

(!) 7 H. & N., 987; 31 L. J. (Ex.), 346.

damage was sustained thereby; and the same may be said if the switches or anything of that sort were defectively constructed, and it were made out that in the course of a journey over the rails an accident arose from that defective construction. So, again, as regards persons employed by the carrying company or made use of by them. The management of the stations, for example, is in the hands of certain persons; certain regulations are made; and I will suppose that whilst the regulations are proper and sufficient the persons entrusted with the duty of enforcing them, as in the *Rhymney Case*, fail to do so, and an accident occurs in consequence. In such a case the contracting company in performing their contract make use of those persons, and although the arrangements at the station may be in other hands, still the carrying company would be responsible. That seems to me consistent with reason, and certainly is consistent with the authorities that have been referred to; it is consistent with *Great Western Ry. Co. v. Blake* ⁽¹⁾, where the decision is put upon the footing of there being no neglect in allowing that to be upon the line which ought not to be there, and it is also consistent with *Thomas v. Rhymney Ry. Co.* ⁽²⁾. In the latter case I was a party to the judgment in the Exchequer Chamber, and acquiesced in it upon the ground referred to in that passage which occurs in the lord chief baron's judgment (at p. 274) where he put the case as one of negligence in something connected with the management of the railway, the defect being in the management of the railway during the journey on which the accident took place. That is the effect of the authorities, which I will not go into any further.

Now, it appears to me that the railway ought to be in a reasonably fit state, free from obstruction so far as regards the management and care of the railway; but it is unsound to argue (as is attempted in this case) that the contract is that the railway shall be in a reasonably fit state so far as regards the acts of third parties, whoever they may be, who, whether [146 negligently or not, cause some obstruction. I cannot connect with the management of the railway something which is the direct effect not of defective regulations of the company, not of any act to which they were parties, not of the neglect of any person whose services they use, but of the neglect of some persons over whom they have no control whatever, and of whose services they do not make use.

It seems to me the case of a level crossing is a very good illustration. Persons have a right to cross a level crossing with a cart. The railway company contracts to carry safely along the

(1) 7 H. & N., 987; 31 L. J. (Ex.), 346.

(2) Law Rep., 5 Q. B., 228; Law Rep., 6 Q. B., 266.

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line, and the level crossing is upon that line. But do they contract that a person shall not, contrary to their regulations, cross at the time the train is going along properly? They do contract that the line shall be in a fit and proper state, so far as it can be made so by regulation; but they do not say it shall be in a proper state if a person, contrary to their regulations, brings a cart there. That seems to me the distinction that ought to be drawn in this case. Without, therefore, in any degree, dissenting from any of the authorities cited, I think the rule should be discharged.

POLLOCK, B. I entirely agree with the other members of the court. The first thing is to find out what is the contract between the parties, and, unfortunately, the distinction between the duty of a carrier in the carriage of goods and the carriage of passengers was for many years not clearly laid down in this country. In America it had been considered, and the decisions were tolerably clear upon it. But in *Readhead v. Midland Ry. Co.* (*) the whole law was thoughtfully considered and carefully laid down, showing that the contract of a railway company with a passenger is not that of an insurer, but simply to take sufficient care and to use due diligence in providing the materials, engines, carriages, and so on, for the passage of the passengers. That being so, there is no difficulty whatever in applying the rule where the railway company's line is all their own; but when you get a case where the passenger, in order to get to his destination, has to go over other lines, over which the defendants' company may have running powers, or which, by some other contract, they may have the right to use, then an [47] *apparent difficulty arises. It is quite clear upon principle, and now upon authority, that the utmost extent to which the railway company, who are the defendants and the first contracting parties, may be made liable, is for due diligence and care and the due provision of proper materials, fixed or locomotive — that is, engines, rails, carriages, and all the necessary appliances for the carriage of the passenger upon the lines in respect of which the contract arose; and this makes it quite immaterial whether it is the case of several railway companies, or a case in which the passenger is carried by different means of locomotion. Such was one of the cases cited by Mr. Field, of *John v. Bacon* (*), where the accident arose at Milford Haven, by reason of the hatchway upon a hulk being out of order. Such is constantly the case. It is so, for example, in the case of a journey from London to Kingstown, which is partly by railway, partly by steamer. There can be no doubt that, in all those instances, the first contracting company would be liable.

(*) Law Rep., 2 Q. R., 412; Law Rep., 4 Q. B., 379. (**) Law Rep., 5 C. P., 437.

But there you must stop. If you do not stop there, it is impossible to say in respect of whose contract you would seek to make the defendants liable. Their liability would extend to the acts of all persons using the railroad.

Now, Mr. Field, feeling this difficulty, argued that this is not merely the ordinary case of a highway. He admitted that, if any person, either by an obstruction in the highway, or by running into another carriage, injured a passenger, then the carriers would not be liable; but, he said, that here there is something in the nature of an agreement between the Midland Company and the other company, whereby the Midland Company gets the benefit of the other company's using their line. Upon that part of the case I think Mr. Barker put the sections of the act of parliament clearly before us, and showed that the railway was still a highway, and that this was merely a particular arrangement as to this particular highway; just as in London and other large towns a portion of the highway is attributed to tramways, while the rest of the public are left to their common law rights upon the rest of the road.

But I am not prepared to say, that if Mr. Field's argument were right there would be any liability. Take the case of a man who let out a field to a number of persons, and that a number of *the lessees came and exercised their horses in that [148 field, their common property. Each man coming into that field contributes money to the man who is the owner, but he does not become the agent of the owner in such a manner as to make the owner responsible for all his actions. And if one were riding his horse properly and carefully in that field, and another person came in with a horse which was vicious and troublesome, and known by the rider to be so, and partly by that, and partly by the carelessness of the rider, an injury was occasioned to another person; in that case the owner of the field, though he got the benefit of the letting, would not be responsible for the act by which the person got the injury, unless he had knowledge upon the subject. I do not think that the Midland Company can be made liable, except by showing either that the act was occasioned by some misfeasance or negligence on the part of themselves or their servants, or was occasioned by the act or misfeasance of some other people in such a manner that the Midland Company had a knowledge of it and could have remedied it. That is not the case here, and therefore I think they are not liable.

Rule discharged.

Attorneys for plaintiff: *Doyle & Edwards.*

Attorneys for defendants: *Hayes, Twisden, & Parker for Burbary & Smith, Sheffield.*

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Mackereth v. Glasgow and South Western Railway Co.

See 1 Redfield on Railways (5th ed.), 508-9, 618, 620, 631-6, 640-1.

Where one company was running cars on the road of another, but not shown to be by authority of the latter, and negligently killed a cow it was held that under the statute of Indiana neither company was liable for the injury. *Cincinnati, etc. v. Paskins*, 36 Ind., 380.

It has been held that a passenger injured by a collision resulting from the concurrent negligence of two rail road corporations, may maintain a joint action against both. *Colegrove v. N.Y.*, etc., 20 N. Y., 492. But the later cases in New York, throw some doubt on the

question. *Mooney v. Hudson River R.R.*, 5 Rob., 548.

It seems that if the company with which the passenger is riding be negligent and the other be not he cannot recover. *Brown v. N.Y. Cent. R.R.*, 31 Barb., 385, 32 N.Y., 597.

So if both be negligent. *Thomas v. Rhymney. R. R. Co.*, L. R. 5 Q. B., 226, affirmed in Exchequer Chamber L.R., 6 Q. B., 268; *Thorogood v. Bryan*, 8 C.B., 115 but see, the *Milan Lush*, Adm., 388.

In New Hampshire, the lessee of a railway track is held to be the owner and to be liable for negligence by its agents. *Pierce v. Concord Railway Co.*, 51 N.H., 590.

[Law Reports, 8 Exchequer, 149.]

Jan. 23, 1873.

[149] *MACKERETH V. THE GLASGOW AND SOUTH WESTERN RAILWAY COMPANY.

Foreign Corporation—Service of Writ—Service on Officer in England—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 16.

The defendants were a Scotch corporation, with running powers over an English railway to Carlisle, and their only officer in England was a booking clerk at a station at Carlisle, whose sole duty was to issue tickets to travelers. The station at Carlisle was wholly under the control of the English company, but the defendants had use of it at a rental payable to that company. The defendants' head office was in Scotland:

Held, that the booking clerk was not a head officer or clerk of the defendants, who could be properly served with a writ issued against the defendants. *Newby v. Von Oppen* (Law Rep., 7 Q. B., 293) distinguished.

RULE calling on the plaintiff to show cause why the writ of summons in this action and the service thereof should not be set aside.

The writ was issued and served on the defendants under the following circumstances: The defendants are a Scotch railway company, and have no part of their railway in England. They have, however, running powers in perpetuity by agreement with the Caledonian Railway Company over the part of the Caledonian Railway which lies between Gretna and the Citadel Station at Carlisle. The defendants have the use of that station at a rental payable to the Caledonian and London and North Western Railway Companies, who are joint owners of the station. The defendants have a booking clerk there. The writ in this action (which was for injuries caused by a collision between a train belonging to the defendants and a train belonging to the

Caledonian Railway Company) was served on the booking clerk at Carlisle, and was forwarded by him to the defendants' secretary at Glasgow. The defendants' principal or head office is at Glasgow. The directors hold their meetings there, and the secretary and general manager both reside there, and it is there that the affairs of the defendants' railway are conducted. Except the booking clerk at Carlisle, the defendants have no officer in England, and he has no power or authority whatever at the station beyond the power of issuing tickets to passengers by the defendants' trains.

**Herschell*, Q.C. showed cause. The service was a good [150 service according to the principles laid down in *Newby v. Von Oppen* (¹), where it was decided that service of a writ on the head officer of an English branch of a foreign corporation carrying on business in England is good. In that case *Blackburn, J.* (at p. 296), says, a company must be treated as "resident" wherever they carry on trade. Here the defendants do carry on business in England, and the booking clerk at Carlisle is their only officer in England. The 15 & 16 Vict. c. 76, s. 16, which is declaratory of the common law, enacts that a corporation may be served by serving their head officer or clerk, and the booking clerk at Carlisle being their only officer must be deemed the head officer and the right person to serve. The company carry on business at Carlisle, and the section therefore applies to them, although a foreign corporation with no office in England would not be included in its terms: *Ingate v. Austrian Lloyd's Co.* (²) [He also referred to *Wilson v. Caledonian Ry. Co.* (³)]

Wills, Q.C., and *Carter*, in support of the rule. If the plaintiff is right, although the contract be made and the breach occurs out of the jurisdiction, the defendants can be sued here. If the defendants, instead of being a corporation, were individually liable, they could not be sued, for by s. 18 of the Common Law Procedure Act, 1852, although a writ can be served on a British subject abroad, it cannot be served on a British subject in Scotland or Ireland.

[*BRAMWELL*, B. Scotland and Ireland were advisedly excluded, and not as has been supposed *per incuriam*.]

Why then should a different rule be applied to a corporation? The real question is, whether the defendants can be said in any sense to reside at Carlisle. If they were an English company with a head office elsewhere, it is clear that the service here would be bad; and it seems absurd to hold that because their head office is in Scotland service on the Carlisle clerk is good.

(¹) *Law Rep.*, 7 Q. B., 293.

(²) 5 Ex., 822; 20 L. J. (Ex.), 6.

(³) 4 C. B. (N.S.), 704; 27 L. J. (C. P.),

1873

Mackereth v. Glasgow and South Western Railway Co.

The decisions under the County Court Acts as to the meaning of the words "carry on business" are all unfavorable to the plaintiff: see *Shiels v. Great Northern Ry. Co.* ⁽¹⁾; *Garlon v. Great 151] Western Ry. * Co.* ⁽²⁾ *Wilson v. Caledonian Ry. Co.* ⁽³⁾ is distinguishable. There the defendants were partly an English company. Here the defendants are purely a Scotch corporation without property in England, and cannot be sued in England: *Carron Iron Co. v. McLaren.* ⁽⁴⁾

Newby v. Von Oppen ⁽⁵⁾ does not govern this case. There the defendants had a regular branch establishment in London, and one of the main purposes of their existence was the sale of arms there.

BRAMWELL, B. I think this rule should be made absolute. The service of this writ, if it is not good under the Common Law Procedure Act, 1852, is not good at common law. We may, therefore, consider the question as arising under the statute. Now s. 16 enacts that a writ of summons issued against a corporation aggregate, may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. But "clerk" here does not mean any clerk, but a principal clerk like a town clerk in the case of a municipal corporation or the secretary of a public company. The case of *Wallon v. Universal Salvage Company* ⁽⁶⁾ (decided under 2 Wm. 4, c. 39, s. 18), is an authority for this interpretation of the words. Is the service then on this clerk at Carlisle, good? I think not. One has only to describe his duties to see that he is not a head officer of the defendants. The words of the section, therefore, are decisive against the plaintiff. It is argued, however, that wherever a railway company carry on any part of their business, there they must be taken to reside and to have a head officer. I cannot assent to this as a general proposition, although, no doubt, in some cases, as in *Newby v. Von Oppen* ⁽⁵⁾, it may be true. If the defendants had been individuals and not a corporation, it would certainly have been an evasion of the Common Law Procedure Act, 1852, s. 18 (which excludes British subjects residing in Scotland), to have effected service by the means employed here. But if the service could not have been effected on an individual, I can see no reason why a corporation should be in a different position. Why should the statute leave *Scotch-152] men out and Scotch corporations in? I can see no reason.

The argument *ab inconvenienti* was pressed upon us; but it tells against the plaintiff; because if he is right the action would be maintainable though the contract and its breach both hap-

(1) 30 L. J. (Q. B.), 331.

(2) 1 E. & E., 258; 28 L. J. (Q. B.), 103.

(3) 5 Ex., 822; 20 L. J. (Ex.), 6.

(4) 5 H. L., 418, at p. 458.

(5) Law Rep., 7 Q. B., 293.

(6) 16 M. & W., 438.

pened in Scotland. A purely Scotch cause would then be triable in London.

Again, it was virtually conceded that if the defendants were an English company, this clerk would not be a proper person to serve. In other words, we are asked to hold that he is a head officer not because of his duties, but because his master happens to live in Scotland. That seems a strange consequence. Moreover, as Mr. Carter pointed out, this plaintiff could not have sued the defendants, if they had been an English company, in the Carlisle County Court without special leave, because they could not be held to reside there. I must add, that the case of *Newby v. Von Oppen* ⁽¹⁾, is very different from this one. Here the clerk's employment is of a very limited character. In a sense he is capable of making contracts for the defendants. But in the case in the Queen's Bench the main object of the defendants was to sell the goods they manufactured, and they were rightly held to reside at the place in England where they offered their goods for sale. In making this rule absolute, therefore, I do not feel it necessary to dissent from this authority, although I am not prepared to agree with the abstract proposition there laid down in the judgment by Blackburn, J., at all events without further consideration.

CLEASBY, B. I am of the same opinion. The service of a writ must be on the "head officer" of a corporation, and in the case of an English corporation there is not much difficulty, although, no doubt, there might be two head offices in different towns. Here the head office, using the word in its ordinary sense, is abroad, but the defendants conduct business in England. Now, in cases where a defendant has a regular branch establishment here, service on the manager there might suffice. Each case must depend upon the sort of business carried on in England. It is easy to conceive of cases where a corporation might be a foreign one nominally and yet its business chiefly trans- [153 acted at an English establishment. But here the defendants really are a Scotch company, and their only officer in England is a mere clerk who issues tickets; one who is entrusted with a subordinate part of work, and who shares with numerous other servants of the company this limited duty. Such a man is not in any sense a "head officer." Moreover the agreement which has been referred to shows that he was under the control of the English company. In fact he is simply a subordinate of the defendants, with a license from the English company to issue tickets in a part of their booking office.

In coming to this decision, I do not at all wish to be considered as dissenting from *Newby v. Von Oppen*. ⁽¹⁾ There the

⁽¹⁾ Law Rep., 7 Q. B., 293.

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facts were different and the decision therefore arrived at was different.

POLLOCK, B. I am of the same opinion. I felt at first pressed with the authority of *Newby v. Von Oppen* (¹), but upon consideration, I think it clearly distinguishable. There the very existence of the company as a trading corporation made it essential to have a place of business, with a manager, in England. In the present case, looking at the character of the company and the duty of the agent, it may be said to be a mere accident that they employed a booking clerk of their own at Carlisle. The defendants are not an English corporation although they have running powers over a line in England. If they had been English, then, as my brother Bramwell pointed out, there could have been no doubt. It cannot make a difference that their head office is in Scotland. But I do not at all wish to be thought to dissent from the decision in *Newby v. Von Oppen* (¹). If, however, the abstract proposition there laid down be correct, service at any place between Gretna and Carlisle, even on a mere porter, would be enough. For the defendants carry on their business all along the line. The view I take receives some confirmation from the county court cases more particularly referred to by Mr. Carter. Upon the whole, therefore, I agree that the rule should be made absolute. *Rule Absolute.*

Attorneys for plaintiffs: *Phelps & Sidgwick.*

Attorneys for defendants: *Beale, Marigold, & Beale.*

[Law Reports, 8 Exchequer, 154.]

Feb. 19, 1878.

[IN THE EXCHEQUER CHAMBER.]

[154] *THE COMPANY OF AFRICAN MERCHANTS, LIMITED, v. THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED.

Insurance—Usage of African Trade—Policy on Ship during "Stay and Trade"—Mixed Policy.

The plaintiffs effected a policy of insurance with the defendants upon a ship at and from Liverpool to the west or south-west coast of Africa, "during her stay and trade there," and back to a port of call in the United Kingdom, at 8l. 8s. per cent, returning a per centage varying with the period of the risk, the ship being held covered at 18s. 4d. per cent per month if more than twelve months out.

The ship proceeded to the African coast, and, after being loaded for the return voyage, remained at a port there for some weeks for a purpose in no way connected with trade. She was subsequently lost on the voyage home.

(¹) Law Rep., 7 Q. B., 293.

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At the trial of an action on the policy, the judge ruled that, as the delay had not been for a trade purpose, there had been a deviation, and directed a verdict for the defendants. On the argument of a bill of exceptions tendered to this ruling:

Held, a proper direction.

BILL of exceptions. The declaration was on a policy of insurance effected by the plaintiffs with the defendants on the 19th of July, 1869, upon the ship *William Dent*, at the rate of 8*l.* 8*s.* per cent at and from Liverpool to the west or south-west coast of Africa, "during her stay and trade there," and back to a port of call or discharge in the United Kingdom; returning 20, 40, or 60 per cent according as the risk should end, in ten, eight, or six months, the ship being held covered at 13*s.* 4*d.* per cent per month if longer than twelve months out.

Plea (among others) of deviation. Issue.

The cause was tried at the Guildhall Sittings after Michaelmas Term, 1872, before Kelly, C.B., when the following facts were proved:

The plaintiffs' ship, *William Dent*, sailed in July, 1869, from Liverpool to the coast of Africa with a general cargo. She arrived at Kinsembo, on that coast, in September, and discharged her outward cargo. At the same port she took in a cargo of nuts, copper ore, ivory, &c., and on the 8th of November left the port. Her cargo was not then a full cargo, and she proceeded to other *places on the coast, taking in more [155 cargo at each place. On the 21st of November she arrived at Cabenda, which is an open roadstead on the south-west coast, and at times exposed to heavy seas. The roadstead, however, is, as compared with others on the coast, a good one.

The ship was anchored as near the shore as she could safely get, and discharged a part of her cargo into lighters. She then proceeded to take in more cargo, and on the 24th of November, 1869, was completely loaded. The hatches were battened down, and the ship was then ready to sail on her homeward voyage. On the 25th of November a vessel, called the *Robert Jones*, struck on rocks near the entrance of the roadstead. She was got off, but afterwards sank two or three cables length from the *William Dent*. Her cargo was purchased by the plaintiffs, and the *William Dent* was detained in order to allow of her captain and crew being employed in saving the cargo of the *Robert Jones*, and for no other purpose. On the 26th of December the *William Dent* sailed for Liverpool. She had been injured in the interval by a heavy tornado, but had been repaired, and at the time of her departure was perfectly seaworthy. Upon her homeward voyage she was lost.

The learned judge was of opinion that the plea of deviation was proved, and directed a verdict for the defendants. The

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plaintiffs tendered a bill of exceptions, which came on for argument.

Feb. 18, 19. *Cohen*, for the plaintiffs. If this policy had been an ordinary voyage policy, the plea of deviation would have been proved, for in such a case delay is deviation. But this is a mixed policy at and from Liverpool to Africa during the ship's staying and trading there; and the premium is to vary with the deviation of the risk. The parties, therefore, contemplated the ship's remaining an indefinite time on the coast.

[COCKBURN, C.J. The policy is to cover the ship whilst she is staying and trading. Can you contend that her stay to help in saving the cargo of another ship, which her owners had bought, is a stay for a trade purpose?]

The purpose was not strictly a trade purpose, but as the policy [56] *contemplated a risk of uncertain duration, it must be taken that there was a discretion to stay, and, unless the risk was increased, the delay does not constitute a deviation, although the stay may not have been for a trade purpose. The policy gives liberty to stay. But the ship need not trade whilst staying.

Milward, Q.C., for the defendants. The delay was a deviation. The stay contemplated by the policy is for trade purposes only, and the purpose for which this ship was detained was in no sense a trade purpose, either in the ordinary sense or according to the usage of the African coasting business. The risk was therefore varied, and mere variation is enough. The risk need not be increased. If it ceases to be the same as that which the underwriter insured, his liability ceases.

Cohen, in reply.

[The following authorities were referred to on the argument: Phillips on Insurance, s. 983; Arnould on Insurance, 3d ed. vol. 1, p. 361; 4th ed., by Maclachlan, vol. 1, pp. 446, 447, 449; *Harrison v. Ellis* (!); *Hartley v. Buggin*. (?)]

COCKBURN, C.J. I am of opinion that the ruling of the lord chief baron was right. I agree that this policy is not a voyage policy nor a time policy simpliciter. It is a combination of the two; being a policy on a voyage to the west coast of Africa, but at the same time in one sense a time policy, because the assured is entitled under it to keep the ship insured on that coast for any period subject to certain conditions. But, whatever the policy be called, the purpose of the voyage is distinctly stated. It is that the ship is to "stay and trade" on the African coast. Mr. Cohen has ingeniously argued that these words mean "stay and something more;" in other words, that the liberty to trade is an enlargement of the permission to stay. If this were so,

(?) 7 E. & B., 465; 26 L. J. (QB.), 239. (?) 3 Dougl., 39.

however, the word "stay" would itself have been sufficient, and the words "and trade" would have been superfluous. I cannot assent to this construction of the policy. I think the language used means that the vessel may stay for a trading purpose, but for no other; that is, for any purpose which having regard to the usage of the African trade, may fairly be regarded as a "trade purpose." For example, suppose *after the cargo [157 was loaded it became doubtful whether the destination originally fixed for it by the owner should be adhered to or whether that destination might not be changed with advantage, a delay whilst the port of discharge was being fixed would be a delay for a trade purpose. So again, if the vessel was used for a purpose foreign at first sight to trade, but still sanctioned by usage, as happened in the case cited from Douglas (*Hartley v. Buggin* ⁽¹⁾), the delay would not be a deviation. It would be a question of fact for a jury whether the purpose was or was not a trade purpose. But in the present case no attempt was made to show that a delay in order to save a wreck belonging to the same owners was, by the usage of the African trade, in any sense a trade purpose; and we must assume, therefore, that the delay was not for the purpose of trade at all, but foreign to it. This being so, the risk undertaken by the underwriter was varied, and he is therefore discharged.

BLACKBURN, J. I am of the same opinion. The principle which governs the case is thus stated in Phillips on Insurance, s. 983: "It is not necessary to a deviation or change of risk whereby the underwriters are discharged that the degree or period of the risk should be thereby increased. The assured has no right to substitute a different risk."

The underwriter insures a particular risk, and the assured has no right to change it. Whether he increases or diminishes it is immaterial; if he varies it the underwriter is discharged. Now what was the risk which in this case the underwriter insured against? The policy is upon the William Dent, at and from Liverpool to the coast of Africa, during her stay and trade there, at a premium varying with the duration of the risk. Therefore the parties knew and contemplated that the stay of the vessel might be more or less protracted. But the risk covered was a staying and trading. It is true that in the African coast trade many things might by usage be considered as "trading" which would not be so considered elsewhere. For example, the employment of the ship as a tender or as a floating warehouse might be within the term. If, therefore, this vessel had been used for some purpose recognized in the coasting trade as a "trade purpose," I by no means wish to be *under- [158

(1) 3 Dougl., 39.

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stood to say that there would then have been a deviation, although such a use of her would not come within the ordinary meaning of the word "trade." But where there is a real change of risk by the employment or detention of the ship for some purpose wholly foreign, the underwriter has a right to say, "I never undertook this risk. *Non haec in foedera veni.*" This proposition is entirely borne out by the case of *Hartley v. Buggin* ⁽¹⁾, where Lord Mansfield, C.J., says: "It is not material to constitute a deviation that the risk should be increased." In that case the ship insured had been used as a floating warehouse or factory ship, and the question was, whether such a use of her was by usage consistent with the object of the voyage. The policy was on the ship at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves, and the case was sent to a new trial to ascertain what the usage was. Upon that trial evidence of custom having been given on the one side and the other, Eyre, C.B., left it to the jury to say whether the use of the ship as a factory had the voyage for its object, and the jury found a verdict, which was not questioned afterwards, for the defendant. Now here, if there had been any evidence that by the usage of the coast, a delay to salve a wreck was a delay for a "trade" purpose, the proper question would have been, "Do you think that the stay was for the purpose of trade?" But no evidence whatever was offered that a delay to salve a wreck belonging to the owner was either by usage or otherwise a trade purpose. Therefore we do not need to avail ourselves of the doctrine in *Ryder v. Wombuell* ⁽²⁾ that a mere scintilla of evidence need not be left to the jury, for here there was not even a scintilla. I think, therefore, that a variation of the risk was clearly proved, and that the lord chief baron's ruling was right.

KEATING and MELLOR, JJ., concurred.

GROVE, J. I have had some doubt during the argument, not upon the principle of law to be applied, but upon the true construction of this policy. Mr. Cohen's contention was that the policy contemplated a stay for any purpose, trading or otherwise, and that therefore a mere delay without increased risk [59] did not constitute a variation *of risk. There was a license for an increased premium to "stay;" and the license to trade whilst staying did not, he argued, contract the previous word. In short, he read the words "stay and trade" disjunctively, and I was at first disposed to concur in this construction. But I am now satisfied that the words must be construed as the rest of the court construe them. They mean "stay for trading;" and here the ship stopped not to trade but to help to salve a

(1) 3 Dougl., 39.

(2) Law Rep., 4 Ex., 32.

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wreck. Her delay was, therefore, what may be called capricious. The risk was varied in a manner not contemplated by the underwriter and the policy ceased to bind him.

HONYMAN, J., concurred.

Judgment for the defendants.

Attorneys for plaintiffs: *Walker & Sons.*

Attorneys for defendants: *Argles & Rawlins.*

END OF HILARY TERM, 1873.

C A S E S
DETERMINED BY THE
 COURT OF EXCHEQUER,
AND BY THE
 COURT OF EXCHEQUER CHAMBER
ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,
IN AND AFTER
 EASTER TERM, XXXVI VICTORIA.

[Law Reports, 8 Exchequer, 160.]

April 16, 1873.

160] *ALLGOOD and Others, v. BLAKE, ROACH v. BLAKE,
 REED v. BLAKE.¹

Will—General Intent—Estate to be Enjoyed by one Person—"All and every other the Issue of my Body"—"Other the Issue"—Words of Exclusion or Completion—"For Default of such Issue."

A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F. successively in tail male; and for default of such issue to R., the second son of his son, for life, with remainder to the first and other sons of R. successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born, successively in tail male; and for default of such issue to his daughter I. for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter E., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter L., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S., for life, with remainder to her first and other sons, successively in tail male; and for default of such issue, to all and every the fourth and fifth, and other daughter or daughters of his son successively, and in remainder one after another, and to the heirs male of their bodies; and for default of such issue, "to the use and behoof of all and every other the issue of my body," and for default of such issue to his right heirs. The will also contained a wish that [161] the estates should be retained in the hands of "one person and should not be dispersed, and a provision that any female who inherited, should, with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A monument box was directed to go to the person entitled from time to time to the estates:

Held (affirming the judgment of the court below), that there was, by virtue of the penultimate limitation, a vested remainder at the death of the testator in tail general, to which his son then became entitled.

This remainder descended to F. who duly executed a disentailing deed. He devised the estates to the defendant's father, from whom it descended to the defendant. In actions of ejectment (s) by persons claiming as issue of the body of the testator as joint tenants *per capita*, at the time the estates vested in pos-

(¹) Affirming 3 Eng. R., 430.

session, (b) by the heiress in tail general of the testator at the same period, and (c) by the heir in tail of the testator at his death, those being excluded who came within the particular limitations:

Held (affirming the judgment of the court below), that the defendant was entitled to judgment.

ERROR from the decision of the Court of Exchequer upon special cases stated, in four actions of ejectment.

The facts are fully set forth in the judgment of the court below ⁽¹⁾.

The cases were argued for the plaintiffs, on Feb. 15, 17, and 18, by the following counsel:

In the first action by *Manisty*, Q.C. (*Waley* and *G. Bruce* with him).

In the second action, by *Sir G. Jessel*, S.G. (*W. H. Bagshaw* and *Wallis* with him).

In the third action, by *Bristowe*, Q.C. (*Day*, Q.C., with him).

For the defendant, in these three actions, *Charles Hall* (*Sir J. B. Karlake*, Q.C., and *Kemplay*, Q.C., with him), appeared, but, except in the second action, was not called on to argue.

There was also a fourth action [*Allgood and Others v. F. Blake*] by the plaintiffs in the first action, in respect of other property against another defendant, who also claimed under the will of the third baronet, and whose interest was therefore identical with that of the defendant in the other actions. For him, *Joshua Williams*, Q.C. (*Trevelyan* and *G. Brown* with him), appeared, but was not called on to argue.

The course and nature of the arguments sufficiently appear from the judgment.

The following authorities in addition to those cited in the Court *below ⁽²⁾ (most of which were again referred to), [162 were relied on: *Baker v. Tucker* ⁽³⁾; *Martin v. Strachan* ⁽⁴⁾; *Doe d. Pilkington v. Spratt* ⁽⁵⁾; *Wrightson v. Macaulay* ⁽⁶⁾; *Vanderplank v. King*. ⁽⁷⁾

At the close of the arguments the court affirmed the judgments of the Court of Exchequer in the first, third, and fourth actions, reserving their judgment in *Roach v. Blake* and their reasons for affirming the judgments in the other actions.

Cur. adv. vult.

April 16. The judgment of the court (Blackburn, Keating, Mellor, Grove, and Honyman, JJ.) was delivered by

BLACKBURN, J. The questions raised in these four actions all depend upon the construction of the same clause in the will of

⁽¹⁾ Law Rep. 7 Ex., 339 at pp. 340-349.

⁽²⁾ Law Rep., 7 Ex. at pp., 344, 345.

⁽³⁾ 3 H. L. C., 106.

⁽⁴⁾ 5 T. R., 107 (n).

⁽⁵⁾ 5 B. & Ad., 731.

⁽⁶⁾ 14 M. & W., 214.

⁽⁷⁾ 3 Hare, 1.

Sir Francis Blake, who died on the 29th of March, 1780, having made the will in question on the 8th of January, 1780. The provisions and effects of the will are sufficiently stated in the judgment of the court below, printed in *Law Rep.*, 7 Ex. from the middle of p. 346 to the middle of p. 349; and to that report we refer instead of repeating them again.

The whole question in each of the causes depends upon the true construction of what has been called the penultimate clause in the will.

The general rule is that, in constructing a will, the court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words. As is said in *Wigram on Extrinsic Evidence*, p. 9: "The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words." But we think that the meaning of words varies according to the circumstances of and concerning which they are used.

[163] *In *Doe d. Hiscocks v. Hiscocks* (¹), in the judgment of the Court of Exchequer, it is said: "The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names and describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. All the facts and circumstances, therefore, respecting persons or property to which the will relates are undoubtedly legitimate and often necessary evidence to enable us to understand the meaning and application of his words."

No doubt in many cases the testator has for the moment forgotten or overlooked material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has, by blunder, expressed what he did not mean. And the general rule, we

(¹) 5 M. & W., at p. 369.

believe, is undisputed, that, in trying to get at the intention of the testator, we are to take the whole of the will, construe it altogether, and give the words their natural meaning (or, if they have acquired a technical sense, their technical meaning), unless, when applied to the subject matter which the testator presumably had in his mind, they produce an inconsistency with other parts of the will, or an absurdity or inconvenience so great as to convince the court that the words could not have been used in their proper signification, and to justify the court in putting on them some other signification which, though less proper, is one which the court thinks the words will bear.

The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great *as to justify the court in putting on them [164 another signification, which to that mind seems a not improper signification of the words, whilst to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction.

Grey v. Pearson (1) is an example of this. Lord Cranworth, Lord St. Leonards, and Lord Wensleydale laid down the general rules in terms not substantially differing from each other; but when they came to apply them to the case in hand, there was a marked difference of opinion. We apprehend that no precise line can be drawn, but that the court must, in each case, apply the admitted rules to the case in hand; not deviating from the literal sense of the words without sufficient reason, or more than is justified; yet not adhering slavishly to them, when to do so would obviously defeat the intention which may be collected from the whole will.

Let us, then, in the first place, see what were the material circumstances known to the testator in the present case.

The state of the testator's family at the time he made his will was as follows: He had one son alive,—Francis, afterwards the second baronet, who was married, and had then living two sons,—Francis, afterwards third baronet, Robert, and three daughters,—Elizabeth, Isabella, and Sarah. These were all young children at the time of their grandfather's will.

The testator also had a daughter Isabella then alive and unmarried. He had also either four or five grandchildren, the issue of a deceased daughter, Sarah, who had married a Mr. Reed, the eldest of whom was a son, John Reed, then in his

(1) 6 H. L. C., 61.

twenty-first year. The statement in the case leaves it doubtful whether a fifth grandchild, Isabella Reed, survived the testator or not.

Having made the earlier provisions in his will, the testator, if he recollected all these facts, and understood the effect of his previous limitations, would have known that he had then in existence at least four grandchildren, the issue of his deceased daughter Sarah, to whom nothing would come under the previous limitations in his will. He would also have known that it was [165] very likely that the *children of his son Francis might have daughters who might have descendants, and that the different tenants in tail male to whom he had limited estates, and his daughter Isabella, might have daughters who might have descendants, and that the four children of his daughter Sarah might have descendants. He therefore knew that there were four persons, issue of his body, in existence, and a fair probability of a large number of persons, issue of his body, coming into existence who would take nothing under the previous limitations in his will. He also knew, or ought to have known, that when all the estates in tail male which he had created had died out there was at least a probability that his estates, if not otherwise disposed of, would descend to co-heiresses, and he has in his will declared that it was his desire "to prevent as far as may be, the dispersion of my estates amongst several persons."

Such being the state of things, he devises his estates, in default of such issue (that is issue who would take under the several estates in tail male already created) "to the use and behoof of all and every other the issue of my body, and for default of such issue to my right heirs for ever." And the question the court has to answer, we apprehend, is what intention do these words express when used by a testator with reference to such a state of the family, and in a will containing such previous limitations and such a declaration of the testator's desire to prevent the dispersion of his estates amongst several persons.

The Court of Exchequer came to the conclusion that the intention expressed by the testator was that his estates, as an entirety, were to go to all the issue of his body successively, according to their order, and that the only means of effecting that intention was to apply the doctrine of *Mandeville's Case*, Co. Litt. 26 b, and construe the will as creating what has been sometimes called a *quasi* entail as if the estate had been conveyed to the testator himself and the heirs of his body.

If this be correct, there was a vested remainder in tail general created, which descended on Sir Francis Blake, the third baronet. And as he has executed a disentailing deed and all the previous estates have expired, his devisees, who are the de-

feudants, have the title, and all the plaintiffs fail. The plaintiffs in the cases now before us dispute the propriety of this decision.

*The two actions of *Allgood v. Blake* and *Allgood v. F.* [166 *Flake* are brought to recover different portions of the property from different defendants, but are in truth one.

Mr. Manisty, who appeared for the plaintiffs in those two actions, contended that the effect of the penultimate clause was to create a devise to a class, namely, to all the issue of the testator's body who should be in existence at the time when the last estate in tail male should expire from the dying out of all the issue who took under the previous limitations.

He argued that this devise vested the remainder in the four children of Sarah who were living at the testator's death, and that the class would open to receive each fresh person born afterwards who was the issue of the testator's body, not being one of those who might take under the previous limitations in the will. As the devise is of the "estates" of the testator, these parties (if this construction is to prevail) would have taken the remainder in fee among them as joint tenants, had it not been for the devise over in default of such issue to the testator's right heirs. This made it necessary to contend that they took separate undivided portions in the estates each as tenants in tail general.

In the events which have happened the result would be that on the death of Mrs. Stag, the last tenant in tail under the previous limitations, the estates were to go to forty-eight different persons as tenants in tail general of undivided parts in the whole; and, also, that several of those being children of living parents, took estates tail in parts at the same time that their parents took estates tail in other parts.

It is obvious that no testator was likely to wish to produce this result, and it is quite certain that this testator who, in the same will, declares his desire "to prevent as far as may be the dispersion of my estates amongst several persons," did not wish to do so; and Mr. Manisty did not dispute this, and he admitted that it produced a very natural prejudice against his clients, which he said was only a prejudice, for the testator had used words (according to his argument) expressing an intention to make this devise, and, in effect, he argued that the court below, instead of interpreting his will, had made a will for him. We think that the utmost he succeeded in showing, was that a devise to the "use *and behoof of all and every other the [167 issue of my body" may from the context, or otherwise, be construed to mean a devise to such persons as answer that description as a class. But we think that the word "issue" is at least quite as naturally used in the sense of heirs of the body as a word

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of limitation, and, consequently, that the decision of the court below in those two cases was right. We therefore did not think it necessary to hear the counsel for the defendants in these two cases, but gave judgment in them affirming the judgment below.

The plaintiff in the action of *Reed v. Blake* is the heir male of the body of John Reed, the eldest son of Sarah, the daughter of the testator, who died in his lifetime. Mrs. Roach, who is the plaintiff in the remaining action, is the only daughter of Mrs. Stag, the last tenant in tail male under the previous limitations of the will, and is also the heir of the body of the testator. These two plaintiffs agreed with the defendants in contending that the estates went under the penultimate devise as an entirety to some one who would take an estate tail in remainder after the estate in tail male of Mrs. Stag; they agreed with each other in contending that the effect of the word "other" was to prevent this remainder from coming to Sir Francis, the third baronet; but they differed from each other as to who it was who took that estate tail.

Mr. Bristowe, who argued for Mr. Reed, contended not only that the word "other" did not include the issue who took under the previous limitations, and who, by the supposition of the will, had failed before the penultimate limitation came into effect, but also that it did not include Mrs. Roach, who certainly was one of the issue of the body of the testator who took no estate under the previous limitations, and who has in no sense of the word failed, but is now alive. We thought this not a tenable proposition, and as in our opinion Mrs. Roach's title, whether preferable to the defendants' or not, was preferable to Mr. Reed's, we did not call upon the counsel for the defendants to argue in this case, but affirmed the decision of the court below.

We felt more difficulty in the case of *Roach v. Blake*, which we heard argued fully and very ably by the solicitor-general for the plaintiff and Mr. C. Hall for the defendant; but after 168] taking time to consider, we are all of opinion that in this case also the decision of the court below was right, and ought to be affirmed.

The words "other the issue of my body," used as they are immediately after speaking of the failure of particular issue, do, in their *prima facie* natural sense, mean issue different from those who have been spoken of before. It is, we think, not so accurate to say that the word "other" excludes those mentioned before as to say that it does not include them. The solicitor-general argued that the word had more force of exclusion, and Mr. Hall did not admit that it had so much.

But the testator has been here speaking of the event of the failure of the issue to whom he had previously limited estates, when the estate which he created by the penultimate limitation would vest in possession. And if he had in contemplation that time only, the issue of his body, who had by supposition died out, and all and every other the issue of his body, would together constitute the whole of the issue of his body. It is a very common thing to read words creating an estate in remainder, which are such as *primâ facie* refer to the expiration of the previous estate (and so would create an estate contingent till that event happened), as creating a vested estate in remainder from the time of the testator's death: cases to that effect will be found collected in 1 Jarman on Wills, 3d ed., p. 764. They are all cases in which some violence is done to the words used because of the great convenience of making the estates vested instead of contingent, and of the probability that the construction really effectuates the intention of the testator, and we think that in this case the intention of the testator clearly is that every one of the other issue should take, and if it is necessary in order to effectuate that intention, we think the court are fully justified in construing the word "other" as being used with reference to the time of vesting in possession, and as a word not intended to be operative but rather intended to be demonstrative; not intended to produce any effect, but to make the idea in the mind of the testator clearer, an intention which no doubt it fulfills very ill.

The Solicitor-General, with considerable reason, said that a decision as to the construction of one will can rarely be a guide as to the construction of another not in the same words, but it seems *to us that the counsel for the defendants are justified in [169 their contention that the words of this devise are so similar to those used in the will set out in the special verdict in *Burchett v. Derdant* (*) that the decision of the House of Lords in that case that those words created an estate tail (the reasons for which are unfortunately not reported) must have proceeded on some principle applicable to the present case.

But the main argument of the solicitor-general was that it was in no way necessary to put any violence on the words, for that full effect could be given to the intention of the testator to give an estate to each and every of the other issue without construing the words as creating a vested estate tail general which would descend to and vest in Sir Francis, the third baronet, as heir of the body of the testator.

Two ways in which this might be done were suggested. The first was by construing them as intended to create an estate in

(*) 2 Vent., 311.

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the testator and the heirs of his body, exclusive of those heirs of his body who would take any estate under the previous limitations in the will. So that if Sir Francis, the third baronet, had had a son and a daughter, the estate tail which would have been suspended till the birth of that daughter would have vested in her, subject to an estate tail vesting in any daughter of the son who might thereafter be born and who would come in before her, which again would be subject to be divested on the birth of a niece, the daughter of her brother, if she had one, and so on as long as any male issue of Sir Francis the third existed. This the solicitor-general called an estate in special tail, but no such estate ever has been known up to the present time. We do not think any such estate could be created; and we think it impossible to suppose that the testator intended to create such an estate.

The other mode was what my brother Bramwell, in his judgment below, states was what he thinks the testator probably wished to say, though he thinks he did not say it. It was said we ought to construe this word "other" as meaning that an estate in tail general should be given to the daughters of the sons of his eldest grandson, or those who were the heirs of their bodies at the time when the estates in tail male expired, being [170] contingent as to *the person who was to take till that event happened. And inasmuch as in the event of there being more than one such daughter, the estate would be divided amongst them as co-heiresses, contrary to the testator's express desire to prevent the dispersion of his estates among several persons, it was suggested that such daughters were to take in succession, and on failure of their issue, a new set of contingent limitations were to be implied, which in the events that have happened would have been forty-eight in number, and might have been many more. Perhaps if the testator had given instructions to an able conveyancer, such as framed the earlier part of this will, to prepare a settlement for him to the effect which my Brother Bramwell suggests, that conveyancer might have been able to frame limitations which would have effectuated his intentions. It would not have been easy, and the limitations would, when expressed, have probably been very voluminous, but it might perhaps have been done.

But we think when we are asked to crowd into one word "other," the whole of such a complicated limitation we are asked to put a far greater strain upon the word than can be said to be put upon it by adopting the construction of the Court of Exchequer.

Moreover, the construction contended for on behalf of the plaintiff makes all these numerous remainders contingent, whilst

the other construction makes one vested remainder, which alone is a strong reason in favor of the latter.

We therefore think that the judgment below should in this case also be affirmed.

Judgments affirmed.

Attorneys for plaintiffs: *Jennings.*

Attorney for defendants: *Gray, Johnston, & Mounsey.*

[Law Reports, 8 Exchequer, 171.]

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April 16, 1873.

Bill of Exchange—Alteration in Date—Plea Denying Acceptance.

An alteration in the date of a bill of exchange payable at a specified period after date is a material alteration; and where the bill is declared upon with its altered date, the defense is available to the acceptor under a traverse of the acceptance.

Parry v. Nicholson (13 M. & W., 778) discussed.

DECLARATION that the United Wine Growers of Hungary (Limited), on the 11th day of October, 1872, by their bill of exchange now overdue, directed to the defendant, required him to pay to them, or order, 71*l.* 10*s.* 6*d.* four months after date; that the defendant accepted the said bill, and the United Wine Growers of Hungary endorsed it to the plaintiff, but the defendant did not pay the same.

Plea traversing the acceptance of the bill. Issue.

The cause was tried before Martin, B., at the Middlesex Sittings in Easter Term last. The bill having been produced, and appearing to be dated on the 11th of October, the defendant proved that, when originally accepted by him, it bore date the 1st of October, and that after it had been so accepted and placed in circulation the date had been altered without his knowledge or assent from the 1st to the 11th of October. It was objected that this circumstance should have been specially pleaded, but the learned judge ruled that it was open to the defendant under the traverse of the acceptance, and (the jury having found that the alteration had been made after the bill had been accepted and issued, and had never been assented to by the defendant) a verdict was entered for the defendant.

J. O. Griffiths moved for a new trial on the ground of misdirection. The alteration should have been specially pleaded. It is not such an alteration as rendered a new stamp necessary,

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nor is it the alteration of a part of the bill material for the purposes of pleading. The date of the bill, as alleged in this declaration, is immaterial, and the declaration would have been proved by the production of any bill for the specified amount [172] payable four *months after date. *Parry v. Nicholson* ⁽¹⁾ is exactly in point; and the remarks of Parke, B., in that case as to the immateriality of the date of bills described as in the present declaration are applicable.

[POLLOCK, B., referred to *Cock v. Coxwell* ⁽²⁾ as being in conflict with *Parry v. Nicholson* ⁽¹⁾.]

The latter decision is the later in date, and must govern ⁽³⁾.

KELLY, C. B. There should be no rule in this case. The declaration is upon a bill stated to have been accepted by the defendant on the 11th of October, 1872. The defendant, amongst other pleas, traversed the acceptance. The bill, when produced, appeared to be dated on the 11th of October; but evidence was given by the defendant that, when he accepted the bill, the date was the 1st of October, and he therefore denied that he ever entered into the contract declared on. I think it was open to him to do so under the traverse of the acceptance, and that he is entitled to retain the verdict entered for him on that issue. If the declaration had been on the bill in its original form, the alteration should, no doubt, have been specially pleaded; but the declaration being on the altered bill, no special plea was required.

But then we are pressed with the authority of *Parry v. Nicholson* ⁽¹⁾, and especially with the observation there attributed to Parke, B., that the date of a bill is immaterial. Now, there can be no question that in some cases the date would be immaterial, and, although altered, the defendant would still be bound. In *Parry v. Nicholson* ⁽¹⁾ the facts are not clearly stated; and the decision may perhaps be supported on the ground that, according to the evidence there given, the date was immaterial. But I cannot think that the learned judge could have laid down as a general principle that the date of a bill is not material, although it may have been true as to the particular case; and the cases he referred to do not by any means bear out any such general proposition. I will add, especially with regard to *Hemming v. 173* ⁽⁴⁾ *Trenery* ⁽⁴⁾, on *which he bases his judgment, that it was an action on a guarantee. The plea was *non assumpsit*. Upon the trial it was proved that the instrument had been interlined;

⁽¹⁾ 13 M. & W., 778.

⁽²⁾ 2 C. M. & R., 291.

⁽³⁾ The declaration in *Cock v. Coxwell* (1 C. M. & R., 291) does not appear to have been in the same form as in *Parry*

v. Nicholson. In the former case the date was alleged as part of the description of the bill.

⁽⁴⁾ 9 A. & E., 926.

but the first count of the declaration was upon it in its original form, and it was held very properly that the defense of alteration ought to have been specially pleaded.

MARTIN, B. I am of the same opinion. I cannot think that Parke, B., can ever have laid down generally that the defense of an alteration in date after the issue of a bill payable after date cannot be taken advantage of under the plea of *non accepit*. Such a statement is in direct contradiction to the case of *Cock v. Coxwell* ⁽¹⁾; and the whole matter is fully discussed in the notes to *Master v. Miller* ⁽²⁾, where, after referring to the case of *Parry v. Nicholson* ⁽³⁾, the author lays down the rule to be that, where a plaintiff declares upon the instrument as altered there the defendant may raise any available defense arising out of the alteration under a plea denying the contract; but where the count is on the instrument in its original state, a special plea is required; and to the same effect is a passage in Byles on Bills, 9th ed., p. 315.

POLLOCK, B. I also think this rule should be refused. The distinction between declarations on bills in their original and altered forms is well established. In the former case an alteration must be specially pleaded. In the latter the traverse of the acceptance is sufficient, and this distinction is recognized in the text-books—for instance, in Bullen and Leake, Precedents, 3d ed., p. 532—and is supported by the case of *Cock v. Coxwell* ⁽¹⁾, which was not referred to in *Parry v. Nicholson*. ⁽³⁾ In some cases the date of a bill may be immaterial, and may therefore be omitted in pleading in accordance with the Common Law Procedure Act, 1852, s. 49; but where it is material, and is stated, it must be proved as pleaded.

Rule refused.

Attorneys for plaintiff: *Harper, Broad, & Baltock.*

[Law Reports, 8 Exchequer, 175.]

May 6, 1873.

*WANT V. STALLIBRASS.

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Vendor and Purchaser—Conditions of Sale—Waiver of Objections—Forfeiture of Deposit.

The defendant (with A., since deceased) sold a farm to the plaintiff under conditions of sale; by the 3d condition it was stipulated that the vendors should deliver an abstract of title within seven days, and "all objections and requisitions not stated in writing and delivered to the vendors' solicitor within fourteen days from the

(¹) 2 C. M. & R., 201.

(²) 1 Smith, L. C., 6th ed. at p., 837.
(³) 13 M. & W., 778.

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delivery of the abstract shall be considered as waived, and in this respect time shall be of the essence of the contract;" and by the 14th condition, "if the purchaser shall fail to comply with these conditions, his or her deposit shall be thereupon actually forfeited to the vendors," who were to be at liberty to resell, and recover any deficiency and the cost of resale from the purchaser. The plaintiff paid a deposit of 800*l*. An abstract of title was delivered within seven days; and from the abstract it appeared that the vendors sold as trustees under a will which devised the estate to them on trust to pay the income to F. S., the testator's son-in-law, for life, or to permit him to receive the same, and, after his decease, on trust to sell the estate and hold the produce "upon the trusts for the children of the said F. S., as therein mentioned;" it was further stated in the abstract that F. S. would join in conveying the property.

It was objected by the purchaser, but not till after the expiration of fourteen days from the delivery of the abstract, that F. S. being still alive, the vendors' power of sale had not arisen.

It subsequently appeared that the trusts of the will as to the produce of the sale were for the benefit of such of the children of F. S., by H. S., the testator's daughter, who should be living at testator's death, to be paid to them at twenty-one, or, if daughters, at twenty-one or on marriage, with limitations over for the benefit of survivors on the death of any child under twenty one or before marriage. There were eight children of F. S. and H. S. living at the testator's death, of whom some had since married and settled their shares.

In an action brought by the purchaser to recover his deposit:

Held, that he was entitled to succeed (by Kelly, C. B.), on the ground that no complete abstract had been delivered, and that therefore the time limited for taking objections had never commenced running; (by Martin and Pollock, BB.), on the ground that the 14th condition did not apply to the case of the vendors being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title.

ACTION brought to recover the sum of 300*l*., being the deposit paid by the plaintiff on the purchase by him of an estate called Stone Farm.

At the trial of the cause before Martin, B., at Westminster, on the 20th of November, 1872, it appeared that on the 15th of September, 1865, the defendant and his co-trustee, since [176] deceased, *put up Stone Farm for sale by auction, subject to certain conditions, which (so far as material) were as follows:

"3d. Within seven days after the sale the vendors will, at their own expense, deliver to the purchaser an abstract of their title; all objections and requisitions not stated in writing and delivered to the vendors' solicitor within fourteen days from the delivery of the abstract shall be considered as waived, and in this respect time shall be of the essence of the contract."

12th. "The vendors, being trustees for sale, shall not be required to enter into any covenants other than the usual covenants against incumbrances, nor shall they be required to obtain the concurrence of any one interested in the proceeds of the sale."

"14th. If the purchaser shall fail to comply with these conditions, his or her deposit shall be thereupon actually forfeited to the vendors, who shall be at liberty to re-sell the property, either by public auction or private contract, at such time and place, subject to such conditions, and in such manner as they

shall think fit; and any deficiency in price on the re-sale, and all expenses attending the same, shall immediately afterwards be made good to the vendors by the defaulter at this present sale, or shall be recoverable as and for liquidated damages."

The defendant was the highest bidder at the sum of 1500*l.*; he signed the usual agreement to complete the purchase "according to the particulars and conditions of sale," and paid the deposit of 300*l.*

The abstract of title was forwarded to him on the 18th of September, and among the documents of title abstracted was the will of William Waylett, under which the vendors purported to sell the property. By this will the testator devised the property in question to the vendors, James Stallibrass and John Stallibrass, upon trusts, which were abstracted in the following terms: "Upon trust that they, his said trustees, or the survivor of them, or the heirs, executors, administrators, or assigns of such survivor, should pay unto his son-in-law, Frederick Stallibrass, the annual produce or income arising from the said trust estate, or permit and suffer him to receive and take the same for his own use and benefit for and during the term of his natural life: and from and immediately after the decease of the said Frederick Stallibrass, upon trust *that the trustees or [177 trustee for the time being of that his will should, with all convenient speed, absolutely sell and dispose of the said trust estate, either together or in parcels, and either by public auction or private contract, to any person or persons whomsoever, for such price or prices or sum or sums of money as to his said trustees or trustee for the time being should seem proper: And he thereby directed his said trustees to lay out and invest the proceeds, after payment thereof of all his just debts and funeral and testamentary expenses, and also all costs, charges, and expenses of and relating to such sale, conversion, and investment, in or upon some of the public stocks or funds, or on Government security, or at interest on freehold security in Great Britain, with power to alter or vary the same, and should stand possessed thereof upon the trust for the children of the said Frederick Stallibrass as therein mentioned," the trusts for the children of F. Stallibrass not being abstracted ⁽¹⁾.

(1) These trusts were to pay, assign, transfer, and make over the trust fund unto or for the benefit of all and every the child or children of F. Stallibrass by the testator's daughter Harriet who should be living at the time of his (the testator's) decease, such payments, &c., to be made among them, if more than one, in equal shares, when and as such

of them being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or be married, and if only one child the whole to be so paid, &c., at twenty-one, or if a daughter at twenty-one or marriage; with limitations over to the survivors in the event any child dying under twenty-one,

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It was stated in the margin of the abstract that F. Stallibrass would join in conveying the property.

No objection was made till the 13th of October, when it was objected on behalf of the plaintiff that, the tenant for life being still alive, the power of sale had not yet arisen, and the vendors could therefore make no title. The vendors replied that the objection came too late, but also that it was unsound. Some correspondence ensued, which ended in December, 1865, but no step was taken on either side until the 15th of September, 1871, when the plaintiff issued a writ (but did not serve it) to [178] save the Statute *of Limitations. This writ was renewed on the 14th of March, 1872, and on the 14th of June the plaintiff demanded the return of his deposit.

A verdict was taken for the plaintiff for 300*l.* with leave to the defendant to move to enter a verdict for him, on the ground that the plaintiff did not deliver any objections or requisitions in writing to the defendant's abstract of title within the time limited by the conditions of sale in that behalf, and that the plaintiff's deposit for which this action was brought thereby became forfeited to the defendant, and that the facts proved at the trial disclosed no cause of action in the plaintiff; and if the court should be of opinion that the plaintiff was entitled to recover, the court was to say whether the plaintiff was entitled to recover any and what sum beyond the deposit for which the action was brought. A rule having been obtained accordingly,

April 26. *James, Q.C.*, and *Dixon*, showed cause. First, there can be no doubt that, in fact, the power of sale had not arisen, the tenant for life, on whose decease it was to come into operation, being still alive: *Mosley v. Hide* ⁽¹⁾. Even a decree of the Court of Chancery could not have made the sale valid: *Blacklow v. Laws* ⁽²⁾; *Johnstone v. Baber* ⁽³⁾; and the concurrence of the tenant for life could only bind himself. If this is so, the condition does not apply, for the condition only has reference to imperfections in the title as deduced in the abstract, not to cases where the abstract shows affirmatively that the vendor has no title to sell or convey. Such an abstract is merely illusory, and it is as if A purported to sell property, and furnished an abstract which showed a title in X; it would not enable the purchaser to prepare and tender a conveyance. If the condition would deprive the plaintiff of his right to claim a return of the deposit, it would

and (if a daughter) unmarried; and with provisions for maintenance and advancement.

It also appeared, upon the argument of the rule, that at the death of the testator (which happened in 1852) there

were living eight children of Frederick and Harriet Stallibrass; that all these children had attained twenty-one, and that three of the daughters were married, and had settled their shares.

⁽¹⁾ 17 Q. B., 91; 20 L. J. (Q.B.), 589.

⁽²⁾ 2 Hare, 40.

⁽³⁾ 8 Beav., 233.

also oblige him to pay the rest of his purchase-money, and to take a conveyance from persons who had absolutely no title to convey. No authority can be cited where such an effect has been given to a condition in this form, which is meant to meet the case of formal and technical objections, but not to entrap a purchaser into performance of a contract the consideration for which has wholly *failed. Secondly, the abstract was [179 incomplete, in which case also the condition does not apply. An abstract "is complete whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser" (per Lord Eldon, in *Lord Braybrooke v. Inskip* ⁽¹⁾); but here, as in the similar case of *Lewin v. Guest* ⁽²⁾, where the abstract was on that ground held insufficient, "the title itself was out of the vendor," and "was not outstanding in any persons who were trustees for the vendor, or whom the vendor had any means of compelling to concur" in making the title good, or indeed who could have possibly made the title good. The abstract was therefore illusory. Further, in abstracting a will, "the limitations and uses should, be accurately stated; "if there are any trusts they should be stated;" "all modifications (of a devise) by proviso or otherwise should be accurately stated;" Sugd. Vend. & Pur., 14th ed., pp. 408, 410. All the documents which the vendor has should be fully abstracted: *Blackburn v. Smith* ⁽³⁾. If a material clause of an abstracted document is omitted from the abstract, the abstract is incomplete; *Oakden v. Pike* ⁽⁴⁾. Here the trusts of the will in favor of the children of the tenant for life were omitted, and the clause of the will, as it now appears, shows how material it was that the trusts should have been abstracted in full. Time, therefore, never began to run under the condition: *Hobson v. Bell* ⁽⁵⁾.

Kingdon, Q.C., and Tapping, in support of the rule. The abstract was perfect; it is not necessary that every clause should be set out in full; it is sufficient if the effect is given: Dart, Vend. & Pur., 4th ed., p. 115; and it cannot be denied that the statement that the trusts were for the benefit of the children of F. Stallibrass gave quite sufficient information to enable the purchaser to take his objection. He is, therefore, now precluded from raising this objection, not having made it within the time limited by the conditions of sale. "The purchaser may, by his contract, preclude himself from objecting that the consent of a specified person is necessary, or that the sale is a breach of trust:" Dart, Vend. & Pur., 4th ed., p. 971, citing *Micholls v.*

⁽¹⁾ 8 Ves., at p. 436.

⁽²⁾ 1 Russ., 325, at p. 329.

⁽³⁾ 2 Ex., 793; 18 L. J. (Ex.), 187.

⁽⁴⁾ 34 L. J. (Ch.), 620.

⁽⁵⁾ 2 Beav., 17.

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180] *Corbett* ⁽¹⁾; see also **Murrell v. Goodyear* ⁽²⁾. Moreover a good title could have been made under the Leases and Sales of Settled Estates Act 19 & 20 Vict. c. 120: *In re Shephard's Settled Estate*. ⁽³⁾ *Cur. adv. vull.*

May 6. The following judgments were delivered:

KELLY, C.B. The plaintiff in this case seeks to recover the sum of 300*l.*, a deposit paid upon the sale by auction of an estate called Stone Farm, the plaintiff being the highest bidder, the defendant the vendor. By the conditions of sale, the vendors were to deliver an abstract of title within seven days, and all objections and requisitions not stated in writing and delivered to the vendors' solicitors within fourteen days of the delivery of the abstract were to be considered as waived; and time was to be of the essence of the contract. Further, the vendors were not to be required to obtain the concurrence of any one interested in the proceeds of the sale.

An abstract was delivered by the vendors within the seven days, by which it appeared that one Waylett had devised the estate to trustees, of whom the defendant was the survivor, in trust for his son-in-law Frederick Stallibrass, for his life, and "from and immediately after the decease of the said Frederick Stallibrass," upon trust that the trustees should with all convenient speed sell or dispose of the trust estate, and invest the proceeds and stand possessed thereof, "upon the trusts for the children of the said Frederick Stallibrass as therein mentioned." It is clear that the pretended title as it thus appeared on the abstract, was, in fact, no title at all, inasmuch as it being stated in the abstract that Frederick Stallibrass was still alive, the trustees had no power to sell the estate and could confer no title to it on the plaintiff. The cases cited at the bar of *Blacklow v. Laws* ⁽⁴⁾; *Johnstone v. Baber* ⁽⁵⁾; *Mosely v. Hide* ⁽⁶⁾, are conclusive to this effect. I am of opinion, therefore, that it was competent to the plaintiff at once to throw up the contract and proceed to recover his deposit back.

The defendant, however, contends that the abstract having been delivered within the seven days, the plaintiff was bound to [181] make *his objection within the fourteen days, which he certainly did not. This might have been so if the title disclosed had been merely a defective title, where, upon objection made, defects could have been supplied; but where the abstract, which ought to set forth a *prima facie* good title, shows in express terms

⁽¹⁾ 3 D. J. & S., 18.

⁽²⁾ 1 D. F. & J., 432; 29 L. J. (Ch.).

425.

⁽³⁾ Law Rep., 8. Eq., 571.

⁽⁴⁾ 2 Hare, 40.

⁽⁵⁾ 8 Beav., 233.

⁽⁶⁾ 17 Q. B., 91; 20 L. J. (Q.B.) 539

that the vendor has no power to make a title at all, it is not a case for objection and answer, but the abstract at once enables the purchaser to say that the vendor has broken, or has no means of performing, his contract, and that he is entitled to the return of his deposit.

But the vendor also contends that he has set forth enough of the will of Waylett in the abstract to show that, the remainder being devised to children, it is possible that they, by concurring in the conveyance, may make the title good. But to this the answer is two-fold. First, that he does not show upon the abstract that, even if the concurrence of remaindermen could make a good title, there are any children, remaindermen, to concur; and next, and chiefly, the pretended abstract is in effect no abstract at all, and so no abstract can be said to have been delivered within the seven days. This appears from the authorities cited on both sides. Mr. Dart, relied upon by the defendant, lays it down that an abstract "as perfect as the vendor could furnish it at the date of delivery, although it might be of a defective title, is good, if it states with sufficient fulness the effect of every instrument that constitutes the title." But here the instrument that constituted the title was the will, and the only clause in it fully set forth showed that the trustees had no power to sell; and the clause containing the devise of the remainder to the children was not fully set forth, but merely showed that it was left to the children of Frederick Stallibrass and the clause, as now appearing upon the whole will coming before the court, gives the remainder to children of F. Stallibrass by the daughter of the testator, but only such as should be living at his death and should attain the age of twenty-one; and the abstract is silent as to whether there were any such children, or whether any were living at the testator's death, or ever attained the age of twenty-one. Therefore this instrument, the will, being in the possession of the vendor, was not stated with sufficient fulness; and so the abstract was not as perfect as the vendor could furnish it, and so was not sufficient. Then the case of *Oakden v. Pike* (¹), *cited for the plaintiff, shows that the omission [182 of a clause in a will, if material, vitiates the abstract, and that an abstract which is incomplete is not an abstract at all, within the meaning of the condition. Here then, the abstract having shown that the sale was unauthorized, a good title could have been made, if at all, only by the children of the marriage who had survived the testator and attained the age of twenty-one, becoming parties to the conveyance; and the abstract, by omitting this portion of the clause, gave the purchaser no opportunity of requiring information whether there were any such

(¹) 34 L. J. (Ch.), 620.

children, and whether if there were, they were able and willing to become parties to the conveyance. And, though unnecessary to the decision of this case, I may observe that now that the facts are before us, it appears that there were children of the marriage who survived the testator, and had all attained the age of twenty-one; but one or more of them have settled their shares, giving interests to their children who are under age or who may come into existence hereafter, but are yet unborn. So that upon the whole evidence it is impossible for the defendant to make a good title.

POLLOCK, B. ⁽¹⁾. The plaintiff in this action seeks to recover from the defendant the sum of 300*l.*, which was paid by him on the 15th of September, 1865, as the deposit on the purchase of an estate called Stone Farm, which the defendant on that day sold by auction, and for which the plaintiff was the highest bidder. The ground upon which the plaintiff alleges that he is entitled to recover is, that the defendant has failed to make a good title to the estate so sold. The defendant's answer is two-fold. He says, first, that there is no valid objection to the title; and, secondly, that even if this be so, and that he, the defendant, could not enforce the sale by specific performance, or call on the plaintiff to pay the balance of the purchase-money, yet the plaintiff has forfeited his deposit by failing to comply with the conditions of sale.

With respect to the first contention on the part of the defendant the facts are these: The defendant was devisee under the will of William Waylett, who devised the estate in question to the defendant upon trust to pay to the testator's son-in-law, 183] *Frederick Stallibrass, during his lifetime, the annual income arising from the said estate; and after the decease of the said Frederick Stallibrass, to sell the said estate and pay the proceeds to the children of the said Frederick Stallibrass. At the time of the sale Frederick Stallibrass and his children, eight in number and all of age, were alive. Under these circumstances it seems clear that the defendant had no such title to the estate as he could have compelled the plaintiff to accept, and, consequently, no action could have been maintained for the balance of the purchase-money. This proposition is thoroughly established by the cases cited for the plaintiff of *Blacklow v. Laws* ⁽²⁾, *Johnstone v. Baber* ⁽³⁾, and *Mosley v. Hide*. ⁽⁴⁾

The defendant's second contention is based upon the conditions of sale, which, in so far as they are material, are as follows: [The learned judge stated the conditions set forth above.] Where personal property is sold, it is not usual to add

⁽¹⁾ Martin, B., concurred in this judgment.

⁽²⁾ 2 Hare, 40.

⁽³⁾ 8 Beav., 238.

⁽⁴⁾ 17 Q. B., 91; 20 L. J. (Q.B.), 539.

any condition of sale respecting the title of the vendor; and in the absence of any express stipulation, if the vendor cannot perform his part of the contract, the same ground that entitles the vendee to resist payment of the whole price entitles him also to recover back any deposit he may have made in part payment thereof, on the ground that there has been a total failure of consideration. In the case, however, of real property, the title to which is a matter requiring professional learning, an estate cannot change hands by sale without the interchange between the solicitors of the vendor and vendee of what are commonly known as an abstract of title, and objections to or requisitions thereon. Every vendor of freehold property is bound to furnish to the intended purchaser an abstract of all the deeds, wills, and other instruments which have been executed with respect to the land in question during the last sixty years; and if this is not done by a perfect abstract, the vendee may object or require further information. The very statement of this practice shows the necessity, where there is a sale by auction of real property, for conditions similar to those embodied in the present contract for sale; and it may well be that these may be so framed as to entitle a vendor to retain the deposit, although he cannot enforce the contract against the vendee. In this case the abstract *of title which was furnished by the defendant as vendor, [184 after bringing down the title to William Waylett, the testator, recited the terms of his will as follows: [The learned judge stated the passage of the abstract set forth above.]

This abstract was sent to the plaintiff's solicitor on the 18th of September, 1865, and no objection to it was delivered until the 13th of October, when more than fourteen days had elapsed.

On the part of the plaintiff it was contended that this abstract was insufficient; first, because it showed that the defendant could not give a good title during the lifetime of F. Stallibrass; and secondly, because it failed to disclose the real title of the defendant, inasmuch as it did not state that there were any children of F. Stallibrass living.

If the only question for our determination were whether the abstract was sufficient, I should incline to think that it was. The first objection, that it disclosed a faulty title, is met, in my opinion, by the answer, that provided a vendor gives a true abstract of the title which he has at the time, the abstract is good, although the title shown by it is bad, and for this the ruling of Rolfe, B., afterwards upheld by this court, in the case of *Blackburn v. Smith* ⁽¹⁾ is a sufficient authority. As to the second objection, the reference in the abstract to the will of William Waylett and the trust created thereby for the children

(1) 2 Ex., 788; 18 L. J. (Ex.), 187.

of F. Stallibrass, "as therein mentioned," in my view sufficiently called the attention of the vendee to the trusts created by the will to call on him to make objections or requisitions, and remove this case from the ground of decision acted upon in the cases of *Hobson v. Bell* ⁽¹⁾ and *Oakden v. Pike*. ⁽²⁾

But I do not think it necessary for us to pronounce any opinion upon either of these objections, because the question here is, not whether the abstract was sufficient (the words "sufficient abstract" are not used in the conditions of sale); the question is, has the plaintiff by any default on his part, or breach of the conditions of sale, debarred himself from his right to reject the insufficient title proferred to him and to recover back his deposit. The language of the 3d condition is not that 185] if the purchaser *does not deliver his objections or requisitions within fourteen days he is to forfeit his deposit, or be taken to have failed to comply with the conditions of sale, but that by such non-delivery within the specified time all objections and requisitions "shall be considered as waived;" and if the defendant's contention were correct, it would follow that the plaintiff, by not objecting within the stipulated time, waived all objections to title, and must not merely forfeit the deposit, but accept and pay for the estate.

Now the right of a vendee to a good title is a right, not merely growing out of the agreement between the parties, but is given by the law. This is affirmed by Lord St. Leonards in his work on Vendors and Purchasers, ch. 9, s. 1 (14th ed., p. 337), and is supported by the case of *Hall v. Betty* ⁽³⁾, and it would be putting a most unreasonable construction upon the conditions of sale to hold that the vendee, by failing to object to the abstract within the stipulated time, not merely waived any requirement as to further information or further security, which he might have properly enforced against a vendor who had a valid title, or one capable of being made valid, but that he became liable to accept a title wholly bad, when the very basis of the contract, apart from the conditions of sale, was that the vendor was bound to give a good title.

The case has been most carefully argued, but no authority has been cited for the proposition, nor do I think it is tenable.

The basis of the contract is that the vendor has a title, and although parties might by their conditions of sale waive even this, I do not think the plaintiff has done so; on the contrary, it appears to me that by failing to give any objection or requisition within the stipulated time he cannot be taken to have waived that which was the foundation of the whole contract, and

(1) 2 Beav., 17.

(2) 34 L. J. (Ch.), 620.

(3) 4 M. & G., 410.

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which on the face of the defendant's own abstract is shown not to exist. The rule to set aside the verdict for the plaintiff ought therefore to be discharged.

Rule discharged.

Attorneys for plaintiff: *Withall & Compton.*

Attorney for defendant: *M. K. Braund.*

[Law Reports, 8 Exchequer, 186.]

April 28, 1873.

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CAVES V. BALL.

Bankruptcy Act, 1869, s. 126—Resolution to accept Composition—Pleading.

A resolution under the Bankruptcy Act, 1869, s. 126, by the requisite majority of creditors to accept in satisfaction from the debtor a composition upon the debts due, payable at a future time or by instalments, may be pleaded in bar to an action for the original debt, brought before any default on the debtor's part by a creditor bound by the resolution.

Edwards v. Coombe (Law Rep., 7 C. P., 519); *In re Hatton* (Law Rep., 7 Ch., 723), discussed.

Slater v. Jones. DECLARATION by the trustee under proceedings for liquidation by arrangement of George Piggott and Edmund Smith, on a bill of exchange accepted by the defendant, and indorsed by the drawers to George Piggott and Edmund Smith before the presentation of the petition for liquidation.

Plea, that before the said bill was due the defendant summoned a meeting of his creditors in the manner prescribed by the Bankruptcy Act, 1869, after due notice, and the requisite majority, by an extraordinary resolution, resolved "that a composition of six shillings in the pound on the amount of the defendant's debts, whereof two shillings should be payable in four months, and two shillings in eight months, and two shillings in twelve months from the complete registration of the resolution, should be accepted in satisfaction of the debts due from the defendant to his creditors respectively;" averment of compliance with all the provisions of the Bankruptcy Act, 1869, and that all things were done, &c., necessary to make the said resolution binding on all the creditors of the defendant, including the plaintiff; and to make the said composition a bar to the causes of action pleaded to.

Replication that the time for the payment of any part of the said composition had not elapsed, and no part of the same had been tendered or paid to the plaintiff.

Demurrer and joinder.

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Capes v. Ball. Declaration by indorsee against acceptor of a bill of exchange.

[187] *Plea, that after accepting the said bill the defendant, in conformity with the provisions of the Bankruptcy Act, 1869, presented a petition for liquidation by arrangement, and at a general meeting of creditors, a resolution was passed by the requisite majority "agreeing to accept a composition of one shilling in the pound from the defendant, to be paid within three months after the final registration of the resolution;" averment of compliance with all the provisions of the Bankruptcy Act, 1869, and that all things, &c., happened to bind the plaintiff; and that the said composition was not payable at the commencement of the action, nor is the same now payable.

Demurrer and joinder.

The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 126, enacts that "the creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. . . . The provisions of a composition accepted by an extraordinary resolution, in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom are shown in the statement of the debtor produced to the meetings at which the resolution was passed, but shall not prejudice or affect the rights of any other creditors."

Thesiger, in support of the demurrer to the replication in *Slater v. Jones*, contended that it was no answer to the plea, inasmuch as the composition resolution was itself a satisfaction of the debt, and although upon default in payment of an instalment an action could be maintained for the original debt, according to the cases of *Edwards v. Coombe* ⁽¹⁾ and *In re Hatton* ⁽²⁾, still until default no action could be brought. This was clearly the opinion of Willes, J., in *Edwards v. Coombe* ⁽³⁾, and is not inconsistent with the judgments of James and Mellish, L.JJ., in *Re Hatton*. ⁽⁴⁾

R. H. Reid, contra. The cases cited show that after default an action can be maintained for the original debt. But if so, the composition resolution cannot be pleaded in bar, even before default. For if pleadable now, the effect would be to extinguish the debt according to the principle laid down in *Ford v. Beech* ⁽⁵⁾ that a right of action once suspended is gone altogether. There is no injustice in holding that the mere resolution cannot be pleaded, as in any instance in which an action was improperly brought, the Court of Bankruptcy would

⁽¹⁾ Law Rep., 7 C. P. 519.

⁽²⁾ Law Rep., 7 C. P., at p. 522.

⁽³⁾ Law Rep., 7 Ch., 723.

⁽⁴⁾ 11 Q. B., 852; 17 L. J. (Q.B.), 114.

restrain the plaintiff by injunction. The resolution is by the act of 1869 put in the place of the composition deed under the act of 1861, and such a deed could not be pleaded unless it contained a release in terms or words equivalent to a release. *Ipstones Park Iron Company v. Pattinson* ⁽¹⁾; *Clarke v. Williams* ⁽²⁾.

Thesiger in reply. The doctrine of *Ford v. Beech* ⁽³⁾ is inapplicable. There is nothing to prevent a man being debarred from suing for his debt under one set of circumstances and yet capable of suing for it under another. For instance, suppose a plaintiff had assigned his debt to a person who gave notice to the defendant, and then sued for it. The defendant would have a good answer on equitable grounds; see *Jeffs v. Day* ⁽⁴⁾; and yet, as Blackburn, J., points out in his judgment (at p. 374), in that case, if the debt reverted the creditor would have a right to sue, and the judgment for the defendant in the first action could not, under such circumstances, be successfully pleaded as *res judicata*: *Phillips v. Ward* ⁽⁵⁾; *Walker v. Nevill*. ⁽⁶⁾ It is true that no deed under s. 192 of the Bankruptcy Act, 1861, without a release and equivalent words, was pleadable. But in construing the statutory resolution under the present act, the decisions on the language of the deeds executed under the former act are no guide.

[BRAMWELL, B., referred to *Good v. Cheesman* ⁽⁷⁾ and Starkie on Evidence, vol. ii. p. 17, tit. Accord, as showing that the mere composition resolution might be pleadable in bar until default.]

Wood Hill argued for the plaintiff in *Capes v. Ball*, and referred, in addition to the cases relied on by Reid, to *Ray v. Jones* ⁽⁸⁾.

Haselfoot, contra, was not called on.

*KELLY, C. B. I am of opinion that the defendants in [189 these actions are entitled to our judgment. The question raised in each is the same, and is whether a creditor who is bound by a resolution to accept a composition to be paid by installments or at a future time by a debtor, passed in conformity with the 126th section of the Bankruptcy Act, 1869, can sue the debtor for his whole debt before the time has come for the payment of any installment, or of the composition.

Now, much stress has been laid upon the cases decided under the Bankruptcy Act of 1861; but there is a fundamental distinction between the provisions of that act and of the present Bankruptcy Act. Under the former statute a prescribed majority of creditors could bind all to the provisions of any com-

(1) 2 H. & C., 828; 33 L. J. (Ex.), 193.

(*) 2 H. & C., 717; 33 L. J. (Ex.), 7.

(2) 3 H. & C., 508; 34 L. J. (Ex.), 60.

(*) 3 H. & C., 403; 34 L. J. (Ex.), 73.

S. C. in Ex. Ch., 1001; 34 L. J. (Ex.), 180.

(*) 2 B. & Ad., 328.

(3) 11 Q.B., 852; 17 L. J. (Q.B.), 114.

(*) 19 C. B. (N.S.), 416; 34 L. J. (C.P.),

(4) Law Rep., 1 Q. B., 372.

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position deed to which such majority should agree, and all that the 192d section enacts is that the deed, whatever its provisions, should, upon certain conditions being complied with, bind all the creditors. The effect of each deed must of course be considered by itself. In one, provisions might be inserted amounting to an absolute extinction of the debt; in another there might be no words having that effect; and if the intention of the parties was that the deed should be a bar, it was necessary to express it in plain words. That being so, I think the courts rightly decided that in construing those deeds the ordinary rules of law must be applied, and the intention of the parties be gathered from the words used; and, applying those rules, it was properly held that a deed which did not contain a release, or words equivalent to a release, could not be pleaded. But by the present law the machinery of arrangement is entirely altered. Compositions are no longer carried out by deed, but by resolution; and we have to say what the true construction of the statute is. The matter depends upon the 126th section, which provides that the creditors may, by an extraordinary resolution, resolve, "That a composition shall be accepted in satisfaction of the debts due to them from the debtor." Could the legislature have intended that a creditor who has assented to, or is bound by the resolution, should the next day commence an action against the debtor for his whole debt? Such a construction seems to me to be repugnant to common sense, and certainly one which is not forced upon us by any of the decided cases. Here the creditors have become bound by a [190] resolution *that a composition to be paid by installments, or at a future time, shall be accepted in satisfaction; and I think that a person who is bound by such a resolution is also bound, by necessary implication, not to sue the debtor before the time for payment comes, and until default is made. This construction receives confirmation from many of the cases cited and especially from those referred to by my brother Bramwell, and collected in the 2d volume of Starkie on Evidence, p. 17, whence it appears that an agreement by all the creditors to accept a composition, though not properly an accord and satisfaction, is really a new agreement for which the consideration to each creditor is the forbearance of all the others. A creditor who is party to such an agreement cannot sue for his original debt in contravention of the rights of the others.

It remains to add a few words on the cases of *Edwards v. Coombe* ⁽¹⁾ and *In re Hatton* ⁽²⁾. With regard to the latter, I do not dissent in any way from the decision. The general expressions used by Mellish, L.J., must be taken *secundum sub-*

⁽¹⁾ Law Rep., 7 C. P., 519.

⁽²⁾ Law Rep. 7 Ch., 723.

jectam materiem; and do not seem to me to be applicable to a case where there has been no default in paying the agreed composition. The same remark is applicable to the judgment of Willes, J., in *Edwards v. Coombe* ⁽¹⁾. Indeed, it is clear, from the language of the earlier part of his judgment, that he was of opinion that no action could have been maintained until default.

Then it is contended that the case of *Ford v. Beech* ⁽²⁾ interposes an insurmountable difficulty in the defendants' way; for if the composition resolution is a good bar now, the right of action for the debt would be gone for ever; and according to the decisions I have just referred to, it is clear that the right is not gone, but exists if the debtor makes default. *Ford v. Beech* ⁽²⁾, however, has no application here. For all that is necessary to decide is that although, *rebus sic stantibus*, the plaintiffs have no cause of action, in another state of circumstances a cause of action may accrue to them; and *Edwards v. Coombe* ⁽¹⁾ evidently contemplates that such may be the case. I see no difficulty, therefore, in holding that the present actions will not lie, although in a certain event the *original [19] debts might be sued for, just as a certificate in bankruptcy might be used as a bar to an action for the debt, and yet the same debt could afterwards be sued for if the certificate were set aside for fraud; or again, just as no action can be successfully brought for the price of goods for which a bill of exchange has been given whilst the bill is running, and yet the price can be sued for after the bill has been dishonored.

MARTIN, B. I am of the same opinion. I think the plea good and the replication bad in the first action, and the plea good in the second action. I do not feel at all embarrassed by the decisions which have been referred to upon the act of 1861. By the 192d section it was enacted that "every deed or instrument made or entered into between a debtor and his creditors" upon certain conditions should bind all; and the courts of law, which at first had some difficulty in holding a dissentient creditor bound by the provisions of a deed to which he was no party, at length came to the conclusion that the deed alone was to be looked at in each case, and interpreted both as regards assenting or dissenting creditors in accordance with the ordinary rules governing the construction of deeds. But these decisions have no application to cases under the 126th section of the Bankruptcy Act, 1869. That is an act "to consolidate and amend the law of bankruptcy." Now the meaning of bankruptcy was, that a trader (and now any person) might on certain terms get released from all his debts, and have a certificate of protection or an order

⁽¹⁾ Law Rep. 7 C. P., 519.

⁽²⁾ 11 Q. B., 852; 17 L. J. (Q.B.), 114.

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of discharge. But it becoming notorious that liquidation by arrangement was in fact very common, the modern statutes contain a code for regulating such liquidations, and also a code for regulating compositions with creditors, which contemplates the retention of his property by the debtor and his obtaining the protection of the bankruptcy acts upon agreeing to pay a specified composition. The composition is the essence of the transaction; and it is with "composition with creditors" that part vii. of the act of 1869 deals. Sect. 126 enacts that the creditors may resolve that "a composition shall be accepted in satisfaction of the debts due to them from the debtor," and further, that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding *on all the creditors whose names and addresses and the amount of debts due to whom are shown in the statement of the debtor produced to the meeting at which the resolution was passed." Now I do not think that the words "a composition" are equivalent to "payment of a composition," but that the true construction of the section is, that a creditor who is a party to or bound by the resolution must stay his hand, and cannot the next day after the resolution has passed sue out a writ in respect of his original debt. He cannot sue until there has been default on the debtor's part.

I may add that, for my own part, I doubt whether the effect of the statute is not to give the creditor the agreement for a composition in the place of his debt. But I do not desire without further consideration to dissent from the judgments of the lords justices in *In re Hatton* ⁽¹⁾ and of the Court of Common Pleas in *Edwards v. Coombe* ⁽²⁾.

With regard to *Ford v. Beech* ⁽³⁾, the principle there laid down (at p. 867) that, "The right to bring a personal action once existing and by the act of the party suspended for ever so short a time is extinguished and discharged and can never revive" may be quite true, but in my opinion it has no application here. Moreover, the principle has itself been the subject of much comment in recent cases, and it has been suggested by the late Mr. Justice Willes that many of the difficulties caused by a rigid application of it are removed by construing covenants not to sue, except in certain circumstances, as releases with conditions subsequent. ⁽⁴⁾

BRAMWELL, B. I am of the same opinion, though not without some hesitation; but I think that to hold that no action is maintainable until default is made, is a possible construction of

⁽¹⁾ Law Rep., 7 Ch., 723.

⁽²⁾ Law Rep., 7 C. P., 519.

⁽³⁾ See *Newington v. Levy*, Law Rep., 11 Q. B., 852; 17 L. J. (Q. B.), 114. 5 C. P., 607; Law Rep., 6 C. P., 180.

the terms of the statute, and certainly a more convenient construction than to hold that an action may be brought subject to its being restrained upon application by the defendant to a court of equity or bankruptcy. Moreover, the authorities in reference to agreements, apart from the statute, are in harmony with this view, and *show that an agreement to accept [193 a composition by resolution may well be held to be a bar to any action until default, and in fact equivalent to an accord and satisfaction. The cases (including *Good v. Cheesman* (1)), are collected in the note to Starkie on Evidence, tit. Accord (vol. 2, p. 17), to which I referred during the argument, and establish that an agreement by a man's creditors to accept a composition, though not in strictness an accord and satisfaction, is nevertheless binding, and can be set up as a defense to an action for the original debt, it being in fact a new agreement with the defendant, the consideration of which to the creditor is the forbearance of all the other creditors. Thus in *Boyd v. Hind* (2) Williams, J. (at p. 947), states the law to be as follows: "The law with respect to defenses founded on compositions between a debtor and his creditors appears not to have been distinctly defined until the case of *Good v. Cheesman* (1). It used to be sometimes laid down that a right of action once vested could only be barred by a release, or by an accord and satisfaction. But since the decision of that case the law has been regarded as settled that a composition agreement by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted, so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt if he accepted the new agreement in satisfaction; and that for such an agreement there is a good consideration to each creditor, viz., the undertaking of the other compounding creditors to give up their claim. But no such agreement can operate as a defense if made merely between the debtor and a single creditor; the other creditors or some of them must join in the agreement with the debtor and with each other, for otherwise it would be a bare contract to accept a less sum in satisfaction of a greater which would be invalid by reason of want of consideration for relinquishing the residue." If this be a correct view of the law, it goes to show that we may well regard this composition resolution a good bar to the present action; and the decisions on the Act of 1861, which are upon the construction of the composition deed in each particular case, do not in my opinion affect the question.

So far, then, upon reason and principle, I am disposed to think *the pleas good. But now comes this difficulty, and it [194

(1) 2 B. & Ad., 328.

(2) 1 H. & N., 938; 26 L. J. (Ex.), 164.

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has been well put both by Mr. Reid and Mr. Hill. Two cases have decided that an action is maintainable for the original debt after the debtor has made default in paying an instalment of the composition. But if so, it is said this action must also be maintainable, because if it can be barred now it is barred for ever, upon the principle of *Ford v. Beech* ⁽¹⁾. Now I agree with the judgment in that case that a suspension of a right of action cannot be a defense, for if it were the action would be gone for ever, and I feel a difficulty in understanding the observation upon the revesting of causes of action by Blackburn, J., in *Jeffs v. Day* ⁽²⁾. At the same time I do not think that the authorities cited, coupled with *Ford v. Beech* ⁽¹⁾, are conclusive. Certainly in *In re Hatton* ⁽³⁾ Mellish, L.J., does not say that the resolution would not be a bar to proceedings commenced before default; and in *Edwards v. Coombe* ⁽⁴⁾ Willes, J., indicates that his opinion was the contrary. I think, therefore, we can assent to these two decisions, and yet hold the pleas good thus:— Either this resolution is equivalent to an accord and satisfaction defeasible by matter subsequent, and when the event happens whereby it is defeated (i. e., the debtor's default) a cause of action accrues, or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor that, in case he fails to pay the composition at the time agreed, he will pay the whole debt. And to insert these terms is strictly in accordance with *Good v. Cheesman* ⁽⁵⁾, where Parke, J., expressed his opinion that upon default in performance of the terms of the agreement an action would lie, and also with the justice of the case. For suppose a creditor accepts a composition on a debt four years old, payable at the end of two years, and then the debtor makes default, is the creditor to be bound to sue on his original debt? If so he will fail, for the statute of limitations would be a good defense, whereas if there is a new agreement by the debtor at the date of the composition resolution the creditor's remedy would be preserved. It is true the action in the Common Pleas 195] (*Edwards v. Coombe* ⁽⁴⁾), was on the original bill, but the point I have last suggested was not made.

I think, therefore, the pleas are good, and that upon default there is either a defeasance or—and I think this the preferable view—a right of action upon an implied agreement to pay in case of default entered into by the debtor at the date of the composition resolution.

⁽¹⁾ 11 Q. B., 852; 17 L. J. (Q. B.), 114.

⁽²⁾ Law Rep., 1 Q. B., 372, at p. 374.

⁽³⁾ Law Rep., 7 Ch., 723.

⁽⁴⁾ Law Rep., 7 C. P., at p. 522.

⁽⁵⁾ 2 B. & Ad., 328.

⁽⁶⁾ Law Rep. 7 C. P., 519.

POLLOCK, B. I am of the same opinion, but I have had considerable doubt upon the matter during the argument. Under the Act of 1861 arrangements were carried out by deeds, and in construing them the ordinary rules of construction governed, and the deeds, although by statute they were made binding on dissentient creditors, were those of the parties, and unless they contained a release, or words equivalent to a release, were not pleadable in bar. But the Act of 1869 substituted a resolution for a deed, and we should, I think, interpret the act not exclusively by the light of the old decisions on composition deeds, but we ought to give the widest effect to the words so as to carry out the intention of the statute, which, as has been pointed out, was to free a debtor entirely from his liabilities. And without recapitulating the reasoning of my lord and my learned brothers, I will only say that I think we can hold these pleas to be good without straining in any way the language of the 126th section, and without impeaching the correctness of any of the cases which have been cited.

Judgment for the defendants in each action.

Attorneys for plaintiffs in 1st and 2d actions: *Plunkett; Apps.*

Attorneys for defendants in 1st and 2d actions: *Piesse & Son; J. G. Watson.*

[Law Reports, 8 Exchequer, 196.]

May 12, 1878.

[IN THE EXCHEQUER CHAMBER.]

*THE SHEFFIELD WATERWORKS COMPANY v. BENNETT. [196]

Water Rate — Rent — Annual Value — Landlord paying Rates.

By their local act (16 Vict. c. xxii.), s. 79, the plaintiffs were bound to supply the houses within a certain district with water "at the following rate per annum, that is to say, where the *rent* of such dwelling-house" should not amount to 7*l.* per annum, at a rate not exceeding 6 per cent per annum on such rent, but not exceeding 7*s.* 3*d.* per annum; and so on in a graduated scale.

The defendant was owner of numerous small houses supplied with water by the plaintiffs, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district rate:

Held (affirming the judgment of the court below), that "rent" in s. 79 was equivalent to "annual value;" and that, in estimating the rents on which the water rate was payable, the defendant was entitled to deduct the rates so paid by him.

ERROR on the judgment of the Court of Exchequer delivered in favor of the defendant, on a special case raising the question whether, under the local act of the Sheffield Waterworks Com-

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pany (16 Vict. c. xxii.), the "rent" upon which the plaintiffs were entitled to calculate the water-rate payable under their act, was, as they contended, the actual rent paid to the landlord, or was, as the defendant contended, to be taken as equivalent to "annual value." The case is fully reported in the court below (*).

Field, Q.C. (*James*, Q.C., *Kemplay*, Q.C., and *Barker*, with him), argued for the plaintiffs.

Manisty, Q.C. (*Cave* with him), for the defendant, in support of the judgment below, was not called upon.

THE COURT (Blackburn, Keating, Brett, Grove, Archibald, and Honyman, JJ.), affirmed the judgment, saying, that although there were, as the court below had pointed out, great difficulties in the way of the construction contended for by the defendant, there were also many and great objections to the construction of the [197] plaintiffs, *and agreeing with the court below that the latter objections preponderated over the former.

Judgment affirmed.

Attorneys for plaintiffs: *Pitman & Lane*, for *R. B. Smith, Sheffield*.

Attorneys for defendant: *Pattison, Wigg & Co.*, for *Broomhead & Co., Sheffield*.

[Law Reports, 8 Exchequer, 197.]

May 10, 1873.

[IN THE EXCHEQUER CHAMBER.]

MORRISON V. THE UNIVERSAL MARINE INSURANCE COMPANY.²

Marine Insurance—Concealment—Election to avoid Contract—Delivering out Policy

The plaintiff's insurance broker effected an insurance with the defendants on the chartered freight of the plaintiff's ship *Cambria* without disclosing to the defendants certain information in his possession, which it was material that they should know (October 10th). In so doing he acted in good faith, supposing from inquiries that he had made that the information was incorrect. After initialing the slip, but before executing the policy, the defendants (October 18th) became possessed of the information which the broker had not disclosed; and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void (October 14th or 15th). Upon receiving news of the loss of the vessel, they gave notice to the plaintiff that they did not consider the policy binding on them (October 20th). On the trial of the action upon the policy, the learned judge directed the jury (in substance) that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opinion, whether the defendants had elected to go on with the policy. The jury having found that

(*) Law Rep., 7 Ex., 409.

(*) Reversing 4 Eng. Rep., 433.

the defendants did not so elect, and a rule for a new trial on the ground of misdirection having been obtained and afterwards made absolute in the court below :

Held (reversing the judgment of the court below), that this direction was right ; and that there being no election in fact, and no evidence that the plaintiff had been prejudiced by the defendants not electing earlier to disaffirm the policy, the defendants were not estopped from denying its validity, nor was it material to consider whether their conduct in delivering out the policy without a protest had been such as to entitle the plaintiff to consider it as an election.

APPEAL against the decision of the Court of Exchequer directing a new trial on the ground of misdirection.

*Feb. 14. *Benjamin*, Q.C. (*Batt*, Q.C., and *J. R. Mellor* with [198 him), argued for the appealing defendants.

Holker, Q.C., (*Herschell*, Q.C., and *McConnell* with him), for the plaintiff.

The rule below was granted on the ground (amongst others), that the verdict was against the weight of evidence⁽¹⁾, but it was only made absolute on the ground of misdirection ; and no leave was given to the plaintiff to appeal on that part of the rule which related to the alleged misdirection as to *Lloyd's Lists*, on which the court below was unanimous. The appeal was therefore confined to the alleged misdirection as to election. On the argument of the appeal, however, *Holker*, Q.C., beside urging the arguments used below on that point, contended also that the verdict was wrong ; but the court refused to allow this matter to be gone into.

Cur. adv. vult.

May 10. The judgment of the court (*Blackburn*, *Keating*, *Mellor*, *Lush*, *Honyman*, JJ.), was delivered by

HONYMAN, J. This is an appeal by the defendants from a decision of the Court of Exchequer, making absolute a rule obtained by the plaintiff for a new trial.

The action was brought by the plaintiff, the owner of the ship *Cambria*, on a policy on chartered freight, dated the 12th of October, 1870, for 500*l.* The defendants pleaded, among other pleas, concealment of a material fact. The case came on for trial before *Blackburn*, J., at the Liverpool Winter Assizes, 1871. The following were the facts proved, so far as is material to the question before us : The insurance in question was effected by the plaintiff through his brokers in London, Messrs. *Previté & Greig*. On the 8th of October, 1870, the plaintiff gave orders to his brokers to insure 5000*l.* on the ship and 5000*l.* on freight. and, on the 10th, he sent to Messrs. *Previté and Greig* a telegram in the following words : " 10th October, 1870. Since writing Saturday, paragraph in *Mercury*, ' *Cambria*, *quære* Cameo, from New Orleans, aground on North Breaker.' To-day's *Mercury* says : ' The vessel on the North Breaker, reported yesterday as

(1) See ante, p. 48.

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199] the *Cambria, is stated to be the Cameo from New Orleans.' Can you find out at Lloyd's? Let me know by wire before acting." The broker, upon receipt of the orders and telegram, proceeded to endeavor to ascertain whether the ship reported to be aground was or was not the Cambria. He accordingly (as was admitted on the part of the defendants), in good faith, proceeded to cover the risk, and prepared the usual slip, and, on the 12th of October, 1870, a line of 500*l.* was taken by the defendants' assistant-underwriter, Mr. Prichett (in the absence of Mr. Fisk, the principal underwriter), and that slip was initialed by him.

The broker did not communicate to Mr. Prichett the orders he had received from the plaintiff or the telegram of the 10th, or give the underwriters the opportunity of judging for themselves whether the ship reported to be aground was or was not the Cambria.

Information relating to the grounding of the Cambria had appeared in *Lloyd's List* of the 8th of October, but, by mistake, had not been inserted in the loss book, and was not so inserted till the 12th of October, after the risk had been taken by the defendants. This was seen by Mr. Prichett shortly afterwards on the same day, and he then learnt from the broker that he had been in possession of the information which he had not communicated to him.

It was admitted that in effecting marine insurances the matter is considered merely as negotiation till the slip is initialed, but that when that is done the contract is considered to be concluded.

It was proved to be the usage of underwriters to issue a stamped policy in accordance with the slip, notwithstanding anything that might happen after the initialing of the slip. But it was not stated to be the usage to do so without protesting or notifying to the assured that it was the intention of the underwriters, notwithstanding the delivery of a stamped policy, to rely on the concealment, and as, in general, the concealment is not discovered till after the policy is issued, there probably was no usage on the subject.

It was further proved to be the practice of the defendants always to date the policy as of the date of the slip, and that the 200] *ordinary course of business in the defendant's office, is, that the slips, after being initialed, are sent from the underwriters' department to the secretary's department, and there stamped policies are filled up by the clerks in accordance with the slips, and signed by the directors, and left in the office until called for by the brokers. Accordingly, the clerks filled up a stamped policy in accordance with the slip, dating it as of the 12th of October, 1870, and this was executed by the directors

on the 14th or 15th of October, and deposited in the usual way in the office, and taken away by the broker's clerk on the 14th or 15th. In the meantime, viz., on the 13th of October, Mr. Fisk had returned to London, and was then informed by Mr. Prichett of the circumstances attending the taking of the risk, and that the information had not been communicated to him, but it did not appear that Mr. Fisk took any steps in the matter, though he stated that he was the person whose duty it would be, on ascertaining there had been a concealment, to determine whether the insurance should be carried out.

On the 19th of October, news was received that the ship lost was the Cambria, and the defendants on the next day gave notice to the brokers that they repudiated all liability. Except this, the defendants never gave any notice to the plaintiff or his brokers, or protested in any way against being liable on the policy. The premium was debited to the broker in the usual way, but was not payable till the 8th of November, and was tendered to the defendants after the 20th of October, but refused by them.

The learned judge told the jury that when an underwriter discovers that there has been a material concealment in effecting the insurance, he is not bound to put an end to the policy, but has a right at his election to say, "You have been guilty of a concealment which would entitle me to determine the policy, but I prefer to go on with it;" . . . but he cannot say, 'I elect to go on,' and then, when he hears there is a loss, say, 'Now, that I hear there is a loss I will not recognize the policy.' . . . He cannot keep the contract and get rid of it too. He has a right to say, 'Take back your premium and make the contract a nullity.' He has also a right to say, 'You have done what has entitled me to get rid of the contract, but I will keep the premium and go on.' He has a perfect right to *do either [201 of those things, and when he has got notice of the concealment, he is bound to make his election within a reasonable time; he is not bound to do it with desperately hot speed. A man cannot wait to take his chance, he must elect within a reasonable time."

The learned judge then examined the evidence, and pointed out to the jury that Mr. Prichett knew on the 12th of the concealment by the broker; that on that day he told Mr. Fisk so, and that Mr. Fisk was the man to determine whether the premium should be returned; that he knew on the 13th of October of the non-disclosure, and that he might have returned the premium, or had a right to say he would return the premium, and that the return of the premium would indicate that he considered that he was not liable; that no doubt if he had offered

to return the premium, Mr. Previt  s answer would have been, 'I will not take it,' but still that Mr. Fisk had no right to hold the premium; that he could not play fast and loose; but must either adopt or refuse it.

The learned judge further told the jury that, although a good deal had been said about the slip and the stamped policy, he thought that, as regarded that part of the case, it made no difference whatever, and remarked, that he believed (though the jury probably knew better than he did) that it had been quite correctly stated that the putting it on the slip was considered in fair dealing and mercantile understanding as being the contract, as if it were made on that day. That this would equally apply if the contract had actually issued as a stamped policy. The learned judge again drew the attention of the jury to the fact that Mr. Prichett knew of the concealment on the 12th, and Mr. Fisk on the 13th, that it was not till the 20th, after the news of the loss, that any step was taken by the defendants, and he then asked the jury, "Do you think that the defendants, having the opportunity (taking into account that they should make the election within a reasonable time), had elected to go on with the contract? If so, that puts an end to the defense. On this I express no opinion at all. I leave this entirely to you."

Four questions were left by the learned judge to the jury. The first is immaterial as regards the questions before us. In answer to the second, the jury found that the concealment was a material one. In answer to the third, viz., whether the broker 202] had a right *to suppose that the underwriters were acquainted with *Lloyd's Lists*, they said, No. In answer to the fourth question,—did the defendants' company, after knowledge that the broker had not disclosed this fact, elect to treat the policy as subsisting?—the jury replied, No.

The learned judge thereupon directed the verdict to be entered for the defendants.

In Hilary Term, 1872, Mr. Holker, for the plaintiff, obtained a rule *nisi* for a new trial on the ground of misdirection, the misdirection alleged being, that the learned judge ought to have told the jury that the defendants were to be presumed to know the contents of *Lloyd's Lists*, and that the plaintiff was not bound to communicate information contained in them, and that, on the facts found, with reference to the execution of the policy without protest after knowledge of the concealment, the judge ought to have directed the jury to find for the plaintiff; and also on the ground that on the question of election, the verdict was against the weight of evidence. After argument, the rule was made absolute for a new trial by the majority of the Court

of Exchequer (Martin and Bramwell, BB., Cleasby, B., dissenting).

From this decision the defendants appealed, and we have now to determine whether the case ought to go down to a new trial.

Upon the argument, it was admitted by Mr. Holker, who appeared for the plaintiff, that as the Court of Exchequer was unanimous on that part of the rule relating to *Lloyd's Lists*, and as no leave to appeal was given, it was not open to him to contend before us that the verdict could be upset on that ground. He also admitted that he could not contend that as matter of law the judge was bound to tell the jury that the circumstances before mentioned relating to the delivery of the policy amounted to an election to go on with the insurance. But he drew our attention to the facts that the defendants had made no fresh entry in their books; that they had not struck out the debt of the premium; and that the usage as found was only a usage to deliver out a stamped policy, so as to enable the assured to raise the question; and that it was not found to be the usage to deliver it without a protest or reservation of the underwriter's rights; and he contended that the learned judge ought to have told the jury that the defendants by not protesting *when they issued the policy (as was done by the under- [203] writers in the case of *Nicholson v. Power* ⁽¹⁾), and by remaining quiescent from the 13th of October, when Mr. Fisk became aware of the concealment, down to the 20th of October, when they became aware of the loss of the ship, had allowed the plaintiff to remain under the belief that he was insured, and could not, on hearing of the loss, repudiate their liability. He further submitted, that the learned judge ought to have explained to the jury what amounted to the exercise of election, and that his omission to do so was equivalent to a misdirection.

In our opinion, this contention is ill founded. The law as to the rights of a person who has been induced by fraud to enter into a contract has recently been laid down by this court in the case of *Clough v. London and North Western Ry. Co.* as follows ⁽²⁾: "The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. This was not controverted at the bar, and it is not necessary to cite authorities for it. And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And, as stated in Com. Dig. Election, C. 2, if a man once determines his election it shall

(1) 20 L. T. (N. S.), 580.

(2) Law Rep., 7 Ex., at p. 34.

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be determined forever; and as is also stated in Com. Dig. Election, C. 1, the determination of a man's election shall be made by express words or by act. And, consequently, we agree with what seems to be the opinion of all the judges below, that if it can be shown that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined forever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture. If with [204] knowledge of the forfeiture, *by the receipt of rent or other unequivocal act, he shows his intention to treat the lease as subsisting, he has determined his election forever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election and cannot afterwards waive the forfeiture: *Jones v. Carter*.⁽¹⁾ We cannot do better than cite the language of Bramwell, B., in *Croft v. Lumley* ⁽²⁾, which precisely expresses what we mean. He says 'The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry, he may elect to avoid or not avoid the lease, and he may do so by deed or by word; if with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, and does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? or has he elected to avoid it? or has he made no election?' In all this we agree and think that, *mutatis mutandis*, it is applicable to the election to avoid a contract for fraud. In such cases the question is, has the person on whom the fraud was practiced, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the

⁽¹⁾ 15 M. W., 718.⁽²⁾ 6 H. L. C., at p. 705; 27 L. J. (Q.B.), at p. 330.

position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without resending will furnish evidence that he has determined to affirm the contract, and, when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But we cannot see any principle, and are not aware of any authority for saying, that the mere fact that one who is a party to the fraud has *issued a writ and [205 commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind."

In the case now before us, the learned judge expressly told the jury that if the defendants had elected to go on they could not afterwards, on hearing of the loss, repudiate their liability; and left to the jury to say whether the defendants had elected to go on with the contract, calling their attention pointedly to the fact that Mr. Fisk, whose duty it was to determine the question whether the insurance should be repudiated, knew all the circumstances on the 13th, and that nothing was done by the underwriters to repudiate their liability till the 20th, after the receipt of the news of the loss.

It is true that the learned judge told the jury that he himself attached no weight to the handing out of the stamped policy. But even if we were of opinion that more weight might have been attributable to this view than was given to it by the learned judge, this would not amount to a misdirection, nor can we see that the learned judge failed in any way properly to explain to the jury the nature of an act of election.

The learned judge further told the jury that they were to consider whether the election was exercised within a reasonable time, telling them that the party entitled to elect must do so within a reasonable time. It is not necessary to consider whether this direction is correct, or whether the party entitled to elect may not do so at any time, unless in the meantime he has elected to affirm the contract, or unless the rights of third parties have intervened, or the other party to the contract has altered his position, under the belief that the contract was a subsisting one; for, if the latter be the correct view, the direction of the learned judge was too favorable to the plaintiff, and of course he cannot complain of it.

If, indeed, it had appeared that, in consequence of the delay and of the absence of protest by the defendants, the plaintiff's position had been altered, and he had thereby been induced to believe that the defendants intended to waive their right to avoid the contract of insurance, and had consequently abstained from effecting insurance elsewhere, we should probably have thought

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206] that, though *there had been in fact no exercise by the defendants of their right of election, the case fell within the view taken in *Clough v. London and North Western Ry. Co.* (¹), and that this question ought to have been submitted to the jury. But, in truth, although the plaintiff was examined as a witness on his own behalf, he did not assert that he was induced by the defendants' conduct to think the policy a binding one, and consequently abstained from effecting a fresh policy; and, looking at the letters that passed between the plaintiff and his brokers, set out in Appendix C. to the case (which show that the broker could not succeed in covering the ship or freight for any amount beyond that already effected), it is impossible that any such case could have been successfully made, and we therefore think that the learned judge would have been wrong had he left any such question to the jury.

It remains only to examine the reasons given by Martin and Bramwell, BB., for granting a new trial. The letters to which we have alluded do not appear to have been brought before those learned judges, and we cannot help thinking that if their attention had been drawn to them they would probably have arrived at a different conclusion. Martin, B., treats the case as one of estoppel; but, according to a long series of cases like *Pickard v. Sears* (²), the estoppel would only arise on proof that the plaintiff had been prejudicially affected by a belief that the defendants were treating the contract as binding.

Bramwell, B., does not rest his judgment precisely on this ground, but it is evident that he was a good deal influenced by the belief that the defendants' silence prevented the plaintiff insuring elsewhere, which, as we have pointed out, was not the case.

The learned baron seems to have thought that it was the duty of the defendants, within a reasonable time after discovering the concealment, to notify to the plaintiff their intention to avoid the policy, and that by not doing so, and handing out the policy without objection, they in the absence of any evidence to explain their conduct, entitled the assured to treat it as an election not to avoid the contract. It is to be observed that he does not go to the length of saying that Blackburn, J., ought to have told the jury that the handing out of the policy without 207] protest did, in *point of law, amount to an affirmation of the contract, which precluded the defendants from afterwards raising the question; but that he ought to have left to them the circumstances of the case, as putting the burden of proof on the defendants to show that the plaintiff did not understand, or had no right to understand, the conduct of the defendants as

(¹) *Law. Rep.*, 7 Ex., 26.

(²) 6 A. & E., 489.

an election. For the reasons already given we think this is not so, and that, if there really was no election, it is wholly immaterial whether the plaintiff understood, or had a right to understand, the conduct of the defendants as amounting to an election, unless under that belief he altered his position.

For these reasons we think that the charge of the learned judge is not open to any of the objections made to it.

It was, however, further contended by Mr. Holker, that, though an application for a new trial on the ground of the verdict being against evidence cannot be carried to the Exchequer Chamber, it was competent to him, in supporting the judgment of the court below, to rely on the alleged unsatisfactory character of the verdict as a reason for allowing the rule for a new trial to stand. We are, however, clearly of opinion that it is not so; sitting here as a court of appeal, we have no jurisdiction to deal with anything but matters of law, and cannot entertain the question whether the verdict be or be not unsatisfactory, or any other question of mere discretion.

The result is that the judgment of the Court of Exchequer must be reversed, and the rule for a new trial discharged.

Judgment reversed.

Attorneys for plaintiff: *Sharpe, Parker, & Co.*

Attorneys for defendants: *Thomas & Hollams.*

C A S E S

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXVI VICTORIA.

[Law Reports, 2 Crown Cases Reserved, 21.]

April 26, 1873.

21] *THE QUEEN v. CHARLES SATCHWELL.

Malicious Injury to Property — Arson — 24 & 25 Vict. c. 97, s. 17 — Stack of Straw.

The prisoner was indicted, under 24 and 25 Vict. c. 97, for setting fire to a stack of straw. It was proved that he set fire to a quantity of straw on a lory: *Held*, that he could not properly be convicted.

CASE stated by Blackburn, J.: At the last Summer Assizes for Warwick the prisoner was tried for wilfully and maliciously setting fire to a stack of straw, the goods of William Allsop.

It was proved that the prisoner did wilfully and maliciously set fire to a quantity of straw, amounting to 22 cwt., which was packed on a lory. The straw had been placed on the lory to convey it to market, and brought six or seven miles on the way.

The horses had been removed, and the lory with the straw on it left for the night in the yard of an inn, ready to be taken on to market next morning.

The learned judge inclined to think that the straw, being packed on a lory, was not a stack within the meaning of the 24 & 25 Vict. c. 97, s. 17⁽¹⁾, and consequently that the setting fire to it was not a felony; but the case being clear in fact, directed a verdict of guilty, and sentenced the prisoner to seven years' penal servitude, reserving the point whether the setting fire to the straw was a felony.

No counsel appeared.

BOVILL, C.J. I think the conviction must be quashed. The indictment is for setting fire to a stack of straw. And it is shown that the prisoner set fire to a quantity of straw on a lory. It does not appear whether it was being removed to or from a stack; but it was on its way to market. I do not think that is a stack. A somewhat similar point arose and was decided in the same way in *Rex v. Aris* ⁽²⁾.

BRAMWELL, B., BLACKBURN, ARCHIBALD, and HONYMAN, JJ., concurred.

Conviction quashed.

⁽¹⁾ By 24 & 25 Vict. c. 97, s. 17, grain, pulse, tares, hay, straw, haulm, "Whosoever shall unlawfully and maliciously set fire to any stack of corn, stubble . . . shall be guilty of felony . . ."
⁽²⁾ 6 C. & P., 548.

[Law Reports, 2 Crown Cases Reserved, 22.]

April 26, 1873.

THE QUEEN v. ARTHUR HENRY MORTON.

Forgery—Deed—24 & 25 Vict. c. 98, s. 20—Letter of Orders.

By 24 & 25 Vict. c. 98, s. 20, it is felony to forge "any deed, or any bond or writing obligatory :"

Held, that a letter of orders under the seal of a bishop is not a deed within that section.

CASE stated by Bramwell, B.

At the last sessions of oyer and terminer, and jail delivery at Worcester, the prisoner was tried and found guilty on an indictment, of which a copy is annexed.

The document which he had forged, when produced, was as follows :

23] **"By the tenor of these presents, we, Auckland, by Divine permission, bishop of Bath and Wells, do make it known unto all men that on Sunday, the 23d day of December, in the year of our Lord one thousand eight hundred and sixty-three, we, the bishop before mentioned, solemnly administering holy orders under the protection of the Almighty in our cathedral church of Saint Andrew in Wells, did admit our beloved in Christ Arthur Henry Morton a Master of Arts (of whose virtuous and pious life and conversation and competent learning and knowledge in the Holy Scriptures we were well assured) into the holy order of deacons, according to the manner and form prescribed and used by the church of England, and him, the said Arthur Henry Morton, did then and there rightly and canonically ordain deacon; he having first in our presence freely and voluntarily subscribed to the thirty-nine articles of religion and to the three articles contained in the thirty-sixth canon, and he likewise having taken the oaths appointed by law to be taken for and instead of the oath of supremacy. In testimony whereof we have caused our episcopal seal to be hereunto affixed the day and year above written, and in the seventh year of our translation.*

At the request of the Lord Bishop of Melbourne.

Auckland.



Bath and Wells."

The signature and seal were the genuine signature and episcopal seal of Lord Auckland, bishop of Bath and Wells, and the document was duly signed, sealed, and given out by him.

But when so given out the name in it of the person ordained was Joseph Leycester Lyne, the year was one thousand eight hundred and sixty, and not one thousand eight hundred and sixty-three, and in the margin the letters dismissory were stated to be from the Bishop of Exeter, not Melbourne.

The forgery consisted in altering the name, adding "a master of arts," altering the year, and changing Exeter to Melbourne. The alterations are in italics. It was proved that Lyne was 24] *ordained by imposition of hands according to the service in the prayer book, and that this document had been delivered to him, and afterwards stolen or taken from him without his consent. It was also proved that no other deed or document ordaining or certifying the ordination is ever made or given, though the fact of ordination is recorded in a book kept for that purpose. Doubting whether the document was a deed within the meaning of the statute, the learned judge asked the opinion of the court for the consideration of Crown Cases Reserved thereon.

Indictment. First count, that the prisoner feloniously did forge a certain deed purporting to be under the hand and seal of Lord Auckland, bishop of Bath and Wells, which said forged deed was and is as follows, [it was then set out *verbatim*,] with intent thereby to defraud, &c.

Second count, that the prisoner feloniously did forge a certain other deed purporting to be letters of orders under the hand and seal of Lord Auckland, bishop of Bath and Wells, with intent thereby then to defraud, &c.

Third count, similar to the first, but charging the prisoner with uttering.

Fourth count, similar to the second, but charging the prisoner with uttering.

Goodman, for the prisoner. A letter of orders is not a deed. Many documents under seal are not deeds. Thus an award under seal is not: *Brown v. Vawser* ⁽¹⁾; so of a license: *Chanter v. Johnson*. ⁽²⁾ A deed has been often defined by the older writers. Thus in Co. Lit. 35, b., its requisites are stated to be, "Firstly, writing; secondly, in parchment or paper; thirdly, by a person able to contract; fourthly, by a sufficient name; fifthly, a person able to be contracted with; sixthly, by a sufficient name; seventhly, a thing to be contracted for; eighthly, apt words required by law; ninthly, sealing; and tenthly, delivery." And again, Co. Lit. 161, b, it is said, "A deed signifieth in the common law three things, viz., writing, sealing, and delivery, comprehending a bargain or contract between party and party." In *Shepherd's Touchstone*, Chap. 4, p. 50, a deed is described

(1) 4 East., 584.

(2) 14 M. & W., 408.

as "sealed and delivered to prove and testify the agreement of the parties, whose *deed it is, to the things contained in the [25 deed." These definitions limit the use of the word "deed" to that which contains a contract. But even if this be to limit the meaning of the word too much, it must at least be something having some actual operation, as passing an interest or creating a right. In Spelman's Glossary, title Factum, a deed is defined as "*Scriptum solenne quo firmatur donum, concessio, pactum, contractus, et hujusmodi.*" And the definitions in Comyn's Digest, Cruise Digest, Tomlyn's Law Dictionary, Wharton's Law Lexicon, and 1 Stephen's Commentaries, 5th ed., p. 487, are similar. Nothing has been held to be a deed which does not pass an interest or confer some right or authority: *Rex v. Fuuntleroy* (1); 1 Arnould on Insurance, p. 143, n.

[BLACKBURN, J. If this letter of orders be the solemn and essential record of something of the same nature with a gift, &c., it would appear to be within Spelman's definition.

ARCHIBOLD, J. It would then be very like a charter of feoffment.

BLACKBURN, J. The 4 Hen. 7, c. 13, deprived a clerk of his benefit of clergy for a second offense, if he "hath not then and there ready his letters of his orders, or a certificate of his ordinary witnessing the same."

BOVILL, C.J., That seems to show that the letter of orders was not essential, but that a certificate would do as well.]

The letter of orders is nothing more than a formal certificate. [He referred to Blunt's Book of Church Law, p. 201.]

Jelf (*Amphlett* with him), in support of the conviction. The word "deed" is used in this section in its most general sense. It stands first, and must not be limited by the words that follow it. And as to the general meaning of the word "deed," the definitions cited from Coke are too narrow. Many things are called and treated as deeds which contain no contract: Shepherd's Touchstone, p. 50, 8th ed. where "attornments, exchanges, surrenders, partitions, authorities, commissions, licenses, revocations, and the like" are spoken of.

[BLACKBURN, J. Each of those is the solemn confirmation of an act passing an interest within Spelman's definition.]

*The letter of orders is quite as much a deed as many of [26 these. It is the formal evidence of the deacon's ordination, which is an act conferring authority and privileges. The letter of orders must, by the 137th canon of 1603, be produced at the first visitation. And by the 39th canon a deacon could not without it obtain employment in another diocese, 3 Burn's Eccl. Law, 9th ed., p. 61.

(1) 2 Bing., 418.

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[BOVILL, C. J. Surely all that is merely directory to secure a bishop's knowing his clergy, and to prevent imposition.]

[BLACKBURN, J. referred to *Marshall v. Bishop of Exeter*.⁽¹⁾]

Brown v. Vawser⁽²⁾ and *Chanter v. Johnson*⁽³⁾ are not in point. They were decided not on the nature of the instrument, but on the ground that there had been no delivery.

[Burrell's Law Dictionary, tit. Deed, 4; Bythewood and Jarman, p. 113; *Goddard's Case*⁽⁴⁾; *Rex v. Lyon*⁽⁵⁾; Co. Lit., 52 (a); 33 & 34 Vict. c. 91, were also cited.]

BOVILL, C. J. The prisoner is indicted for forging a document which is described as a deed, so as to bring his offense within s. 20 of 24 & 25 Vict. c. 98. That section speaks of forging "any deed, or any bond or writing obligatory;" and the question we have to consider is, whether the document in question is a deed within the meaning of the words there used. In form it is what is commonly known as a letter of orders under the episcopal seal; and it is necessary, therefore, to ascertain precisely the nature and character of such an instrument. Now the mode of ordaining a deacon in the Church of England is prescribed by the Book of Common Prayer. It must be in the face of the church; and upon the completion of the ceremony the ordained person becomes a deacon. No deed or grant is necessary. But from very early times it has been the practice, after the ordination is completed, to issue letters of orders under the bishop's seal. And at one time, as appears from the statute to which reference has been made, the production of his letter of orders, or a certificate from the ordinary, was necessary to entitle a clerk to the benefit of clergy. The letter of orders is 27] a formal declaration under seal that the bishop "did admit" the person to whom it is given "into the holy order of deacons, according to the manner and form prescribed and used by the church of England, and him then and there did rightly and canonically ordain deacon . . . In testimony whereof" the seal is affixed. Is this, then, a deed within the meaning of the Act of Parliament? In some of the definitions given a deed is described as being something of the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed; so is a gift or grant, a power of attorney, a release, or a disclaimer. I would go further, and say that any instrument delivered as a deed, and which either itself passes an interest or property, or is in affirmance or confirmation of something whereby an interest or property passes, is a deed. Now is the present instrument a

(1) Law Rep., 3 H. L., 17.

(2) 14 M. & W., 408.

(3) 4 East., 584.

(4) 2 Co. Rep., 5.

(5) Russ. & Ry., 255.

deed in this sense? I by no means say that I have enumerated all the possible kinds of deeds; there may be others. But is this a document of the same kind? It does not purport to convey property, title, interest, or authority, but only to certify that a ceremony has taken place. It is a mere certificate or declaration of ordination. Many documents under seal are not deeds; for instance, an award, though sealed. Again, a will is often under seal. So is a certificate of magistrates a certificate of admission to the college of physicians, or to other learned bodies. So is a share certificate. Yet it can hardly be said that all these are deeds. The probate of a will is very similar; it is given under the seal, formerly of the ordinary, now of the Court of Probate. It is a certificate of the will having been proved and administration granted; but I never heard it suggested that that is a deed. I think, then, that a letter of orders is not a deed, and that the conviction cannot be supported.

BRAMWELL, B. I am of the same opinion.

BLACKBURN, J. I quite agree that the affixing a seal does not make a deed. The definition of a deed cited from Spelman seems to me the best; and I doubt whether the present instrument is within it, though I am not quite sure. But whatever be the meaning of the word "deed" in the abstract, the words of the section under which this indictment is framed are, "any deed, bond, or writing obligatory;" and I think those [28] words must be limited to something passing, or which is in affirmance of that which passes, a pecuniary interest; and, therefore, a deed such as this, if it be a deed, is not within them. It is not necessary to consider the question, whether the probate of a will would be a deed within this section. I rather think it is.

ARCHIBALD and HONYMAN, JJ., concurred.

Conviction quashed.

Attorneys for prosecution: *White & Son, for Curtler, Worcester.*

Attorneys for prisoner: *Rooke & Son.*

[Law Reports, 2 Crown Cases Reserved, 28.]

May 3, 1873.

THE QUEEN V. CULLUM.

Embezzlement — 24 & 25 Vict. c. 96, s. 68 — Wrongful use of Barge by Servant of Owner — Freight received neither "for," nor "in the Name," nor "on account of" Master.

The prisoner was captain of a barge, and in the exclusive service of its owner. He was remunerated with half the earnings of the vessel, and had no autho-

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ality to take any other cargoes but those appointed for him. It was his duty to account to his master for the proceeds of each voyage. On one occasion, although ordered to bring the barge back empty from a certain place, and forbidden to take a particular cargo, he, nevertheless, loaded such cargo in the barge, returned therewith, and received the freight. He did not profess to carry the cargo or receive the freight for his master, and the person paying the money did not know for whom he paid it. The prisoner declared that the barge came back empty, and never accounted for the freight:

Held, that he was not guilty of embezzlement, as the money was not received or taken into possession by him "for, or in the name of, or on the account of his master or employer," within 24 & 25 Vict. c. 96, s. 68.

CASE stated by the chairman of the West Kent Sessions.

The prisoner was indicted, as servant to George Smeed, for stealing 2*l.*, the property of his master.

The prisoner was employed by Mr. Smeed, of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London, and to receive back such return cargo, and from such persons, as his master should direct. The prisoner had no authority *to select a return cargo, or take any other cargoes but those appointed for him. The prisoner was entitled, by way of remuneration for his services, to half the earnings of the barge, after deducting half his sailing expenses. Mr Smeed paid the other half of such expenses. The prisoner's whole time was in Mr. Smeed's service. It was the duty of the prisoner to account to Mr. Smeed's manager on his return home after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed, and asked if he should not on his return take a load of manure to Mr. Pye, of Caxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him to return with his barge empty to Burham, and thence take a cargo of mud to another place Murston. Going from London to Murston, he would pass Caxton. Notwithstanding this prohibition, the prisoner took a barge load of manure from London down to Mr. Pye, at Caxton, and received from Mr. Pye's men 4*l.* as the freight. It was not proved that he professed to carry the manure or to receive the freight for his master. The servant who paid the 4*l.* said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom. Early in December, the prisoner returned home to Sittingbourne, and proposed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London and had returned empty to Burham, as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries, the prisoner stated that he had not brought back any manure in the barge from London,

and he never accounted for the 4*l.* received from Mr. Pye for the freight for the manure.

The jury found the prisoner guilty, as servant to Mr. Smeed, of embezzling 2*l.*

The question was whether, on the above facts, the prisoner could be properly convicted of embezzlement (¹).

*No counsel appeared for the prisoner.

[30

E. T. Smith (with him *Moreton Smith*) for the prosecution. The prisoner received this freight either "for," or "on account of his master or employer," and therefore is within the terms of 24 & 25 Vict. c. 96, s. 68. The words, "by virtue of such employment," which were in the repealed statutes relating to the same offense, have been "advisedly omitted, in order to enlarge the enactment and get rid of the decisions on the former enactments:" Greaves' Crim. Law Consolidation Acts, p. 117.

[BOVILL, C.J. An alteration caused by the decision of *Rex v. Snowley* (²), which was a case resembling the present one.

BLACKBURN, J. How can the money here be said to have been received into the possession of the servant, so as to become the property of the master?]

The prisoner was exclusively employed by the prosecutor. With his master's barge he earned, and in the capacity of servant received, 4*l.* as freight, which, on receipt by him, at once became the property of his master: *Rex v. Hartley* (³).

[BLACKBURN, J. But in this case the servant was disobeying orders. Suppose a private coachman used his master's carriage without leave, and earned half-a-crown by driving a stranger, would the money be received for the master, so as to become the property of the latter?]

Such coachman has no authority to receive any money for his master; the prisoner, however, was entitled to take freight.

[BOVILL, C.J. He was expressly forbidden to do so on this occasion.]

Can it be said that he may be guilty of embezzlement, if, in obedience of orders, he receives money, and yet not guilty of that crime if he is acting contrary to his master's commands? See note to *Reg v. Harris* (⁴), in 2 Russell on Crimes, 4th ed., p. 453.

(¹) 24 & 25 Vict. c. 96, s. 68, enacts that "Whoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously

stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed. . . ."

(²) 4 C. & P., 390.

(³) Russ. & Ry., 139.

(⁴) Dears. Cr. C., 344.

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31] * [BLACKBURN, J. In suggesting that case to be erroneous, the editor seems to assume that the decision proceeded on the words, "by virtue of his employment," whereas it did not.

BRAMWELL, B. Suppose the captain of a barge let his master's vessel as a stand to the spectators of a boat-race, and took payment from them for the use of it?]

Such use would not be in the nature of his business.

[BLACKBURN, J. In the note to this section by Mr. Greaves, he remarks, "Mr. Davis (*) rightly says that 'this omission avoids this technical distinction;' but he adds, 'still it must be the master's money which is received by the servant, and not money wrongfully received by the servant by means of false pretenses.' This is plainly incorrect." But in my opinion Mr. Davis was plainly correct, and Mr. Greaves wrong: *Reg v. Thorpe*. (*)]

BOVILL, C.J. In the former act relating to this offense were the words "by virtue of his employment." The phrase led to some difficulty, for example, such as arose in *Reg v. Snowley* (3) and *Reg v. Harris* (4). Therefore, in the present statute those words are left out; and s. 68 requires instead that, in order to constitute the crime of embezzlement by a clerk or servant the "chattel, money, or valuable security . . . shall be delivered to, or received, or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. The prisoner here, contrary to his master's order, used the barge for his, the servant's, own purposes, and so earned money which was paid to him, not for his master, but for himself; and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances, the money would not be received "for," or "in the name of," or "on account of," 32] his master, but for himself, in his *own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed.

BRAMWELL, B. I am of the same opinion. I think in these cases we should look at the substance of the charge, and not merely see whether the case is brought within the bare words of the act of parliament. Now the wrong committed by the prisoner was not fraudulent or wrongful with respect to money, but consisted in the improper use of his master's chattel. The

(*) Davis' Criminal Statutes, p. 70.

(*) Dears. & B. Cr. C., 562

(*) 4 C. & P., 890.

(*) Dears. Cr. C., 344.

offense is, as I pointed out during argument, only that which a barge-owner's servant might be guilty of, if, when navigating the barge, he stopped it, allowed persons to stand upon it to view a passing boat-race, charged them for so doing, and pocketed the money they paid to him. There is no distinction between that case and this, save that the suppositious case is more evidently out of the limits of the statute.

The use of this barge by the prisoner was a wrongful act, yet not dishonest, in the sense of stealing. But I will add, that I do not think this case even within the words of the statute. The servant undoubtedly did not receive the money "for" his master, nor "on account of" his master, nor "in the name" of his master. Nevertheless, I doubt extremely whether, on some future day, great difficulty may not arise as to the meaning of these expressions in s. 68, for I doubt whether, although the servant had used his master's name, he would have been within the terms of the act of parliament. "In the name of" his master is a very curious expression. Suppose a person in service as a carter had also a horse and cart of his own, and employed them to do some or other work, professing them to be his master's, and received hire for it "in the name of" his master, would that be embezzlement? Could he be rightly convicted under this section? I doubt it extremely. The words "in the name of" his master, although inserted with a desire to obviate difficulties, seem to me likely hereafter to raise them.

BLACKBURN, J. I am also of opinion that this conviction cannot be supported. Without criticising the words of the act, let us look at the object of passing it. The common law requires for the offense of larceny, not only *animus furandi*, but that there should be a taking, and it was held, on the narrow distinctions of the common law, that when the property only became the master's by coming into the hands of his servant and not otherwise, the servant could not be said to take his master's property because it came into his hands at the moment it was so received.

It was to meet this difficulty that the legislature said, "he who embezzles shall be guilty of stealing although the property has not become the master's except by the possession of the servant;" and in the original act were the words "by virtue of his employment," which have been expressly omitted from the more recent statute; yet still the essence of the matter is, that the servant shall be deemed to have stolen the master's property, if it be his master's property, although not received otherwise than in the prisoner's capacity of clerk or servant. That is, I take it, the key to the meaning of the whole enactment, the technical objection as to the possession is removed. There-

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fore I think the opinion expressed by Mr. Davis, in his edition of these acts (¹), that "it still must be the master's money which is received by the servant," is correct enough, although the context, "and not money wrongfully received by the servant by means of false pretenses or otherwise," is not quite accurate, because it may be received for the master, although obtained by false pretenses. Now, in the present case, I cannot see how this was the master's property, or that the servant had authority to carry anything in this barge but the cargo he was directed to couvey. He was actually forbidden to load this barge on the return voyage; he did load it, and very improperly earned money by the use of it; but in what sense he can be said to have received this sum for the use of his master I cannot understand. The test of the matter would really be this, if the person to whom the manure belonged had not paid for the carriage, could the master have said, "there was a contract with you, which you have broken, and I sue you on it? There would have been no such contract, for the servant never assumed to act for his master, and on that ground his act does not come within the statute. I think that in no case could he 34] have *been properly convicted under the act unless the money became that of the master.

ARCHIBALD, J. I am also of opinion that this conviction cannot be sustained. The only doubt in my mind was, whether the money earned by the use of the barge might not have been the money of the master, that is, if, instead of cash payment, the manure had been carried on credit there might not have been an implied contract to pay for the carriage to the master. But, on reflection, I think that, although carried in the master's barge, yet, as it was against his will, and carried by the servant in his own name, the contract must be taken to have been with the servant, so that under these circumstances no action by the owner against the proprietor of the manure could have been maintained; and that there was no receipt of the freight "for," or "on account of," or "in the name of" the master. The case does not come within the terms of the statute.

HONYMAN, J., concurred.

Conviction quashed.

Attorneys for the prosecution: *Tassell & Son, Faversham.*

(¹) Davis' Criminal Statutes, p. 70.

This case proceeds upon the well known distinction that the servant obtained the money by doing an act contrary to the orders of his master, and consequently the act itself could not be said to have been done for the master. 2 Bish. Cr. Law (5th ed.), §§ 360-4.

If allowed by the master to receive moneys although it is the duty of another to do so he may be convicted. *Reg. v. Hastie*, 9 Cox, 264; 2 Whart. Cr. Law (6th ed.), § 1942; *Reg. v. Tongue*, Bell's Cr. Case, 287.

When, however, the servant has authority to do the act but exceeds his

powers and receives more or less than he is directed to do, he is guilty of embezzlement even of the excess beyond the amount he is directed to receive. *Regina v. Ashton*, 2 Cox, 234; S. C. 2 Car. and Kirw., 413, questioning *Rez v. Snowley*, 4 C. & P., 390; *Ex parte Hidley*, 81 Cal., 109; *Regina v. Tongue*, Bells Cr. Cas., 289; 2 Bish. Cr. Law (5th ed.), § § 363-4; *Rez v. Haggins*, *Russ & Ry.*, 145; 1 Gabbett's Crim. Law, 616; *Rez v. Bicall*, 1 C. & P., 457

[Law Reports, 2 Crown Cases Reserved, 34.]

May 3, 1873.

THE QUEEN V. NEGUS.

Embezzlement — “*Clerk or Servant*” — 24 & 25 Vict. c. 96, s. 68.

The prisoner was engaged by the prosecutors to solicit orders for them, and was to be paid by commission on the sums received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty he applied for payment of a certain sum; having received it, he applied it to his own use, and denied, when asked, that it had been paid to him:

Held, on the above facts, that the prisoner was not a “clerk or servant” within the meaning of 24 & 25 Vict. c. 96, s. 68.

CASE stated by the assistant judge of the Middlesex Sessions.

The prisoner was indicted for embezzling 17*l.* as clerk and servant to Roape and others.

The prisoner was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on the sums received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors.

Contrary to his duty he applied for payment of the above sum, and having received it he applied it to his own use, and denied, when asked, that it had been paid to him.

The prisoner's counsel contended that the prisoner was not a clerk or servant within the statute, but the learned judge refused to stop the case, and directed the jury to find him guilty.

The question was whether, upon the facts stated, the prisoner was a clerk or servant, and as such rightly convicted of embezzlement.⁽¹⁾

No counsel appeared for the prisoner.

F. F. Lewis, for the prosecution. *Reg. v. Bowers* ⁽²⁾ somewhat resembles the present case, and is an authority in favor

⁽¹⁾ See 24 & 25 Vict. c. 96, s. 68, ante, ⁽²⁾ Law Rep. 1 C. C., 41. p. 29.

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of the prisoner ; but there the commission agent carried on a retail trade for himself at a shop, and so could not be deemed a clerk or servant of the merchants who supplied coal for him to sell.

[BOVILL, C.J. And here the prisoner might apply for orders whenever he thought most convenient.]

So might the traveler in *Reg. v. Bailey* ⁽¹⁾ ; he was nevertheless held to be clerk or servant of his employers.

[BLACKBURN, J. For he was under their control, having to devote his whole time to the service.]

The stipulation that the prisoner was not to employ himself for any other persons than the prosecutors shows that they had control over him.

[BOVILL, C.J. Not at all. He might go away to amuse himself whenever he liked.]

Reg. v. Tite ⁽²⁾ ; *Reg. v. Turner* ⁽³⁾ were also cited.]

BOVILL, C.J. The only question submitted to us is whether, on the facts stated, the prisoner was a " clerk or servant," and, 36] as *such, rightly convicted of embezzlement. The learned assistant judge of the court directed the jury to find the prisoner guilty, subject to this point being raised.

Generally speaking, I should say that the question whether a person is a clerk or servant depends on so many considerations that it is one to be left to the jury, as it is extremely difficult for the court to come to a satisfactory conclusion upon such a matter. Much depends on the nature of the occupation in which the individual is engaged, and the kind of employment. But we have to see if there was enough evidence to show that the prisoner here was a clerk or servant. I think that that fact is not sufficiently made out. What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the orders of his employer so as to be under his employer's control ; and on the case stated there does not seem sufficient to show that he was subject to the employers' orders, and bound to devote his time as they should direct. Although under this engagement with them, it appears he was still at liberty to take orders, or to abstain from doing so, and the masters had no power to control him in that respect. Where there is a salary, that raises a presumption that the person receiving it is bound to devote his time to the service, but when money is paid by commission a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of a traveler, and in *Reg. v. Tite* ⁽⁴⁾, and the other case cited. But in either case there may be no such control, and then relationship does not exist.

⁽¹⁾ 12 Cox Cr. C., 56.

⁽²⁾ 11 Cox Cr. C., 551.

⁽³⁾ Leigh & Cave Cr. C., 30 L. J. (M.C.), 142.

⁽⁴⁾ Leigh & Cave, Cr. C., 29 ; 30 L. J. (M.C.), 142.

All the authorities referred to seem to show that it is not unnecessary that there should be a payment by salary, for commission will do, nor that the whole time should be employed, nor that the employment should be permanent, for it may be only occasional, or in a single instance, if, at the time, the prisoner is engaged as servant. The facts before us do not make out what the prosecution was bound to prove, viz., that the prisoner was clerk or servant.

BRAMWELL, B. This conviction ought to be quashed unless we can see that the prisoner on the facts stated must have been clerk or servant within the meaning of the act of parliament. [37 I am of opinion that on the facts we cannot do so. Looking to principle we find that the statute was intended to apply — not to cases where a man is a mere agent, but where the relationship of master and servant, in the popular sense of the term, may be said to exist. Erle, C.J., in *Reg. v. Bowers* ⁽¹⁾ says, the cases decide “that a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money when and where he thinks proper, is not a clerk or servant within the meaning of the statute.” I think that is perfectly good law, consistent with all the authorities, and, applied here, it shows that the prisoner was not clerk or servant within the definition there given.

BLACKBURN, J. I am of the same opinion. The test is very much this, viz., whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that circumstance by itself alone enables us to say that he was a servant of the prosecutor.

ARCHIBALD, J., concurred.

HONYMAN, J. I agree. The question was not left to the jury to decide, and I cannot satisfy myself that the relationship of masters and servant certainly existed between the prosecutors and the prisoner. It does not appear that the prisoner was bound to obey every single lawful order. Possibly the masters might tell him to go somewhere, and he might justly refuse.

Conviction quashed.

Attorneys for the prosecution: *Allen & Son.*

⁽¹⁾ Law Rep. 1 C. C. R., 41, at p. 45.

END OF EASTER TERM, 1873.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXXVI VICTORIA.

[Law Reports, 2 Crown Cases Reserved, 38.]

June 7, 1873.

38]

*THE QUEEN v. GEORGE MIDDLETON.¹

Larceny—Taking invito domino—Post Office Savings Bank—24 & 25 Vict. c. 14.

The prisoner was a depositor in a Post Office Savings Bank, in which 11s. stood to his credit. He gave notice in the ordinary form to withdraw 10s., stating in his notice the number of his depositor's book and the amount to be withdrawn. A warrant for 10s. was duly issued to the prisoner, and a letter of advice was duly sent to the Post-office at N., to pay the prisoner 10s. He went to that office, and handed his depositor's book and the warrant to the clerk. But the clerk, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8l. 16s. 10d., and placed the latter amount upon the counter. The clerk entered the amount paid, 8l. 16s. 10d., in the prisoner's depositor's book and stamped it. The prisoner took up the money and went away, having at the moment of taking it up an *animus furandi*, and knowing the money to be the money of the postmaster-general:

Held, by Cockburn, C.J., Bovill, C.J., Kelly, C.B., Blackburn, Keating, Mellor, Lush, Grove, Denman, and Archibald, JJ., and Pigott, B. (Martin, Bramwell, and Cleasby, BB., and Brett, J., dissenting) that the prisoner was guilty of larceny:

By Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., on the ground that even assuming the clerk to have the same authority to part with the possession of and property in the money which the postmaster-general would have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property; and the possession being obtained *animo furandi*, there was both a taking and a stealing within the definition of larceny:

By Bovill, C.J., Kelly, C.B., and Keating, J., on the ground that the clerk had only a limited authority to part with the money to the person named in the letter of advice, and therefore no property passed to the prisoner, and the possession was obtained *animo furandi*:

By Pigott, B., on the ground that the mistaken act of the clerk in placing the 39] *money on the counter stopped short of placing it completely in the prisoner's possession, and that his subsequently taking it up was larceny:

Held, by Martin, Bramwell, and Cleasby, BB., and Brett, J., that the prisoner was not guilty of larceny.

¹ This case was reported (from Cox's given they are here reported. S. C. 12 Criminal Cases) in 4 Eng. Rep. (p. 536), Cox's Criminal Cases, 417. but as the opinions were not there.

CASE stated by the common serjeant of London.

At the session of the Central Criminal Court held on Monday, the 23d of September, 1872, George Middleton was tried for feloniously stealing certain money to the amount of £8 16s. 10d. of the moneys of the postmaster-general.

The ownership of the money was laid in other courts in the queen and in the mistress of the local post office.

It was proved by the evidence that the prisoner was a depositor in a post office savings bank, in which a sum of 11s. stood to his credit.

In accordance with the practice of the bank, he duly gave notice to withdraw 10s., stating in such notice the number of his depositor's book, the name of the post office, and the amount to be withdrawn.

A warrant for 10s. was duly issued to the prisoner, and a letter of advice was duly sent to the post office at Notting Hill to pay the prisoner 10s. He presented himself at that post office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8l. 16s. 10d., and placed upon the counter a 5l. note, three sovereigns, a half sovereign, and silver and copper, amounting altogether to 8l. 16s. 10d. The clerk entered the amount paid, viz., 8l. 16s. 10d. in the prisoner's depositor's book and stamped it, and the prisoner took up the money and went away.

The mistake was afterwards discovered, and the prisoner was brought back, and upon being asked for his depositor's book, said he had burnt it. Other evidence of the prisoner having had the money was given.

It was objected by counsel for the prisoner that there was no larceny, because the clerk parted with the property and intended to do so, and because the prisoner did not get possession by any fraud or trick.

The jury found that the prisoner had the *animus furandi* at the *moment of taking the money from the counter, and that [40 he knew the money to be the money of the postmaster-general when he took it up.

A verdict of guilty was recorded, and the learned common serjeant reserved for the opinion of the Court for Crown Cases Reserved the question whether under the circumstances above disclosed, the prisoner was properly found guilty of larceny.

Nov. 23, 1872. The court [Kelly, C.B., Martin, B., Brett, Grove, and Quain, JJ.] reserved the case for the opinion of all the judges.

Jan. 25, 1873. The case was argued before Cockburn, C.J., Bovill, C.J., Kelley, C.B., Martin, Bramwell, Pigott and Cleasby,

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BB. Blackburn, Keating, Mellor, Brett, Lush, Grove, Quain, Denman, and Archibald, JJ.

No counsel appeared for the prisoner.

Sir J. D. Coleridge, A.G. (*Metcalf* and *Slade* with him), for the prosecution.

The arguments and the cases cited sufficiently appear from the judgments.

Jan. 28. PER CURIAM. The majority of the judges think that the conviction ought to be affirmed, for reasons to be stated hereafter.

June 7. The following judgments were delivered:

BOVILL, C.J., read the judgment of Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., as follows:

This was a case in which the prisoner was indicted at the Central Criminal Court for feloniously stealing money, the property of the queen or of the postmaster-general. On the trial he was found guilty; but a case was reserved for the opinion of the Court of Criminal Appeal, which came on in the ordinary course before five judges; but on the argument they were not agreed, and the case was adjourned to be argued before all the judges. Pollock, B., was obliged to be absent at Chambers, and Quain, J., was unwell, but the other judges, fifteen in number, heard the case, and after time taken to consider, eleven [41] of those fifteen judges were of *opinion that the conviction was right and ought to be affirmed; my brothers Martin, Bramwell, Brett, and Cleasby dissenting.

Judgment was accordingly given in accordance with the opinion of the majority; but as it was thought important that the grounds of the decision should be accurately known, it was announced that the reasons of the judgment would on a subsequent day be delivered in writing.

I will now proceed to deliver the judgment of the lord chief justice and my brothers Blackburn, Mellor, Lush, Grove, Denman, and Archibald, which is as follows:

The points raised by the case are in effect three. The uniform course of the indictments for larceny from the earliest times has been to allege that the prisoner feloniously stole, took, and carried away the goods of a named person; and Lord Hale, in his *Pleas of the Crown*, vol. i., p. 165, states with perfect accuracy that the words "feloniously stole and took" are essential to the crime.

In the present case the jury have found that the prisoner had *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the postmaster general when he took it up. So far, therefore, as

the guilty knowledge and felonious intention are ingredients in the crime of stealing, we must take it as proved that the prisoner was guilty; but the case states facts which raise the doubt whether, under the circumstances stated, this was a taking, and also whether it was a stealing, within the meaning put by the law on these averments in an indictment for larceny. And the circumstances which raise that doubt are as follows: Assuming that the clerk who actually was engaged in the transaction had such authority from the postmaster general that all he did is to be taken as done by the postmaster general, it is the first question whether the money can be said to have been taken by the prisoner within the meaning of the averment, inasmuch as the clerk (who on this hypothesis is the postmaster general) certainly meant that the prisoner should take up that money, though he only meant this because of a mistake. Then a second question arises, whether it can be properly said that he stole the money, inasmuch as the clerk, and therefore on this hypothesis the postmaster-general, intended that the property in the money should belong to the *man before him, though he intended [42 that in consequence of a mistake as to his identity, and the prisoner from the beginning knew of the mistake, and had at the time of the taking the guilty intention to steal the money. A third question arises in the event of the two first questions being determined in favor of the prisoner; viz., whether the clerk really had such general authority as to represent the postmaster-general, or whether his authority was not limited to paying the money specified in the letter of advice, viz. 10s., which special authority, if it was so limited, he did not pursue.

The majority of the judges, eight in number, have formed their judgment on the decision of the two first points in favor of the crown, which therefore renders it unnecessary for them to decide the last.

The lord chief justice of the Common Pleas, the lord chief baron, and my brother Keating, who agree with the majority in thinking the conviction should be affirmed, do so solely on the last ground, that the authority of the clerk was a special authority not pursued, and their reasons are stated in two separate judgments.

It is not to be understood that the eight who form the rest of the majority decide this question the other way, but merely that they consider it unnecessary to decide it all.

We now proceed to state the reasons on which we think that it ought to be held that there was, under the circumstances stated, a "taking" within the meaning of the averment in the indictment.

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We agree, that according to the decided cases it is no felony at common law to steal goods if the goods were already lawfully in the possession of the thief; and that, therefore, at common law a bailee of goods, or a person who finds goods lost, and not knowing or having the means of knowing whose they were, takes possession of them, is not guilty of larceny if he subsequently, with full knowledge and felonious intention, converts them to his own use.

It is, to say the least, very doubtful whether this doctrine is either wise or just; and the legislature, in the case of bailees, have by statute enacted that bailees stealing goods, &c., shall be guilty of larceny, without reference to the subtle exceptions 43] engrafted by *the cases on the old law. But in such a case as the present there is no statute applicable, and we have to apply the common law.

Now, we find that it has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and therefore in one sense the taking of possession was not against his will, yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is sufficient taking. We are not concerned at present to inquire whether originally the judges ought to have introduced a distinction of this sort, or ought to have left it to the legislature to correct the mischievous narrowness of the common law, but only whether this distinction is not now established, and we think it is. The cases on the subject are collected in Russell on Crimes, 4th ed., vol. 2, p. 208; perhaps those that most clearly raise the point are *Rex v. Davenport* (¹) *Rex v. Savage* (²).

In the present case the finding of the jury, that the prisoner, at the moment of taking the money, had the *animus furandi* and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the possession of the money.

On the second question, namely whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk (such as it was) to part with the property prevents this from being larceny, there is more difficulty, and there is, in fact, a serious difference of opinion, though the majority, as already stated, think the conviction right. The reasons which lead us to this conclusion are as follows: At common law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery; and it is clear, from the very nature of

(¹) 2 Russell on Crimes, 4th ed. at p. 201.

(²) 5 C. & P., 148; 2 Russell on Crimes, 4th ed. at p. 201.

the thing, that an intention to pass the property is essential both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean, and how this is material. Now, it is established that where a bargain between the owner of the chattel has *been made with [44 another, by which the property is transferred to the other, the property actually passes, though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber, in *Clough v. London and North Western Ry. Co.* (¹), where it is said, "We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Pianoforte Co. to Adams by the contract of sale; the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. . . . We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property; or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."

It follows obviously from this that no conversion or dealing with the goods, before the election is determined, can amount to a stealing of the vendor's goods; for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are, accordingly, many cases, of which the most recent is *Reg. v. Prince* (²), which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences, and cannot be convicted of larceny. In that case, however, the money was paid to the holder of a forged check payable to bearer, and therefore vested in the holder, subject to the right of the bank to divest the property.

In the present case, the property still remains that of the postmaster-general, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him, for there was no intention to give it to him or to any one. It was simply a handing it over by a pure mistake, and no property passed. As this was money, we cannot test the case by seeing whether an inno-

(¹) Law Rep. 7 Ex., 26, at pp. 34, 35.

(²) Law Rep., 1 C. C., 150.

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cent purchaser could have held the property. But let us suppose 45] that a purchaser *of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not; and that on the principle enunciated by Lord Abinger, in *Chanter v. Hopkins* ⁽¹⁾, when he says, "if a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."

We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*.

But it is further urged that if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being that of larceny, though the intention was inoperative, and no property passed. In almost all the cases on the subject, the property had actually passed, or at least the court thought it had passed; but two cases, *Rex v. Adams* ⁽²⁾, and *Rex v. Atkinson* ⁽³⁾, appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principles the cases can be supported if *Rex v. Davenport* ⁽⁴⁾ and the others involving 46] the same principle are law; and though *if a long series of cases had so decided, we should think we were bound by them, yet we think that in a court such as this, which is in effect a court of error, we ought not to feel bound by two cases which,

⁽¹⁾ 4 M. & W., at p. 404.

⁽²⁾ 2 East P. C., 673.

⁽³⁾ 2 Russell on Crimes, 4th ed. at p. 200.

⁽⁴⁾ 2 Russell on Crimes, 4th ed. at p. 201.

as far as we can perceive, stand alone, and seem to us contrary both to principle and justice.

BOVILL, C.J., delivered the judgment of himself and Keating, J., as follows :

The proper definition of larceny according to the law of England, from the time of Bracton downwards, has been considered to be the wrongful or fraudulent taking and carrying away by any person of the personal goods of another, from any place, without any color of right, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent and against the will of the owner. And the question for our consideration is, whether the facts of the present case bring it within that definition.

Under the act for establishing Post Office Savings Banks, 24 & 25 Vict. c. 14, deposits are received at the post offices authorized by virtue of that act, for the purpose of being remitted to the principal office (s. 1). By s. 2 the postmaster-general is to give an acknowledgment for such deposits, and by the 5th section all moneys so deposited with the postmaster-general are forthwith to be paid over to the commissioners for the reduction of the national debt. By the same section all sums withdrawn by depositors are to be repaid out of those moneys through the office of the postmaster-general. By s. 3 the authority of the postmaster-general for such repayment shall be transmitted to the depositor, who is to be entitled to repayment at a post office within ten days.

It appears to us that the moneys received by the postmasters at their respective offices, by virtue of this act, are the property of the crown or of the postmaster-general, and that neither the postmasters, nor the clerks at the post offices, have any power or authority, either general or special, to part with the property in or even the possession of the moneys so deposited, or any part of them, to any person except upon the special authority of the postmaster-general.

In this case the prisoner had received a warrant or authority *from the postmaster-general, entitling him to repayment [47 of 10s. (being part of a sum of 11s. which he had deposited) from the post office at Notting Hill, and a letter of advice to the same effect was sent by the postmaster-general to that post office, authorizing the payment of the 10s. to the prisoner.

Under these circumstances we are of opinion that neither the clerk to the postmistress, nor the postmistress personally, had any power or authority to part with the 5*l.* note, three sovereigns, the half sovereign, and silver and copper, amounting to 8*l.* 16*s.* 10*d.*, which the clerk placed upon the counter, and which was taken up by the prisoner.

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In this view the present case appears to be undistinguishable from other cases where obtaining articles *animo furandi* from the master of a post office, though he had intentionally delivered them over to the prisoner, has been held to be larceny, on the principle that the postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail bags by pretending to be the mail guard, as in *Rex v. Pearce* ⁽¹⁾; the obtaining a watch from the postmaster, by pretending to be the person for whom it was intended, as in *Reg. v. Kay* ⁽²⁾ (where *Rex v. Pearce* ⁽¹⁾ was relied upon in the judgment of the court); and the obtaining letters from the postmaster under pretense of being the servant of the party to which they were addressed, as in *Reg. v. Jones* ⁽³⁾ and in *Reg. v. Gillings* ⁽⁴⁾, were all held to be larceny.

The same principle has been acted upon in other cases, where the person having merely the possession of goods, without any power to part with the property in them, has delivered them to the prisoner, who has obtained them *animo furandi*; for instance, such obtaining of a parcel from a carrier's servant by pretending to be the person to whom it was directed, as in *Rex v. Longstreeth* ⁽⁵⁾, or obtaining goods through the misdelivery of them by a carman's servant through mistake to a wrong person who appropriated them *animo furandi*, as in *Reg. v. Little* ⁽⁶⁾, were, in like manner, held to amount to larceny.

48] *In all these and other similar cases, many of which are collected in 2 Russell on Crimes, 211 to 215, the property was considered to be taken without the consent and against the will of the owner, though the possession was parted with by the voluntary act of the servant, to whom the property had been intrusted for a special purpose. And where property is so token by the prisoner knowingly, with intent to deprive the owner of it and feloniously to appropriate it to himself, he may, in our opinion, be properly convicted of larceny.

The case is very different where the goods are parted with by the owner himself, or by a person having authority to act for him, and where he or such agent intends to part with the property in the goods; for then, although the goods be obtained by fraud, or forgery, or false pretenses, it is not a taking against the will of the owner, which is necessary in order to constitute larceny.

The delivery of goods by the owner upon an order which was in fact forged, as in *Reg. v. Adams* ⁽⁷⁾, the payment of money by a banker's cashier on a check which turned out to be a

⁽¹⁾ 2 East, P. C., p. 608.

⁽⁴⁾ 1 F. & F., 86.

⁽²⁾ Dears. & B. Cr. C. 231; 26 L. J. (M. C.), 119.

⁽⁵⁾ 1 Mood. Cr. C., 137.

⁽³⁾ 1 Den. Cr. C., 188.

⁽⁶⁾ 10 Cox, Cr. C., 559.

⁽⁷⁾ 1 Den. Cr. C., 38.

forgery, as in *Reg. v. Prince* ⁽¹⁾, and the delivery up of pledges by a pawnbroker's manager by mistake and through fraud, as in *Rex v. Jackson* ⁽²⁾, are instances of this kind, and where the intent voluntarily to part with the property in the goods, by a person who had authority to part with the property in them, prevented the offense being treated as a larceny.

In the present case not only had the postmistress or her clerk no power or authority to part with the property in this money to the prisoner, but the clerk, in one sense, never intended to part with the 8*l.* 16*s.* 10*d.* to the person who presented an order for only 10*s.*, and he placed the money on the counter by mistake, though at the time he (by mistake) intended that the prisoner should take it up, and by mistake entered the amount in the prisoner's book. When the money was lying upon the counter the prisoner was aware that he was not entitled to it, and that it could not be, and was not, really intended for him, yet, with a full knowledge on his part of the mistake, he took the money up and carried it away, intending at the time he took it to deprive the owner of all property in it, and feloniously to appropriate it to his own use.

There was, therefore, as it seems to us, a wrongful and fraudulent *taking and carrying away of the whole of this money [49 by the prisoner, without any color of right, *animo furandi*, and against the will of the real owner; and for these reasons, and upon the authorities before stated, we think the prisoner was properly convicted of larceny.

KELLY, C. B. The facts of this case simply stated are these. The prisoner, having deposited 10*s.* in the Post Office Savings Bank, and taken the necessary steps to withdraw it, proceeded to the post office and presented his order for the 10*s.* The post office clerk, having looked at the letter of advice for the payment of the 10*s.*, and at another letter of advice for the payment to another depositor of 8*l.* and a fraction, by mistake took up the 8*l.* odd destined to another depositor, and laid it upon the counter before the prisoner, who took up the money and went away with it, and applied it to his own use. The jury expressly found that he knew the 8*l.* odd did not belong to him, and that it did belong to the postmaster-general, and that he took it up and carried it away with him *animo furandi*. Upon these facts and this finding I cannot bring myself to doubt that the prisoner was guilty of larceny. He saw the money upon the counter before him; he knew that it was not his own, and that it was another person's money; and he took it up and took it away with the intent to steal it. If he had gone into the office knowing that he had to receive 10*s.* and that somebody had to

(1) Law Rep., 1 C. C., 150.

(2) 1 Mood. Cr. C., 119.

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receive 8*l.*, and he had seen the 10*s.* and the 8*l.* lying upon the counter before him, and had taken away the 8*l.* *animo furandi*, no question could have been raised about his guilt. Does it then make any difference that the clerk placed the money before him and intended that he should take it?

If the money had belonged to the clerk, and the clerk had intended to pass the property in the money from himself to the prisoner, or if the money belonging to the postmaster-general or the queen, the clerk had been authorized to pass the property in that money to the prisoner, the case might have been different; but this money did not belong to the clerk, and he had no authority to pass the property in that money to the prisoner.

Reg v. Prince ⁽¹⁾ was cited, where a banker's clerk to whom a 50] *forged check was presented paid the money in ignorance of the forgery, and the receiver, who intended to defraud the banker of the money, was acquitted of larceny, on the ground that the clerk had authority to receive the check, and to dispose of the money which he had paid to the prisoner, and was the agent of the banker in so doing, so that the case was the same as if the banker himself, who was the owner of the money, had delivered it to the prisoner. There, however, the clerk was not only the agent of the banker, but he acted strictly in the discharge of his duty, for he had not only the authority of his employer to pay the money, but in the absence of any suspicion or reason to suspect that the check was forged, it was his duty to pay it, as he did pay it, with the banker's money. And there are other cases where the owner of a chattel delivers it to another, with the intent to pass the property, and the receiver has been acquitted of larceny.

But in this case the post office clerk was not the owner of the 8*l.*, and had no authority whatever to deliver that sum of money to the prisoner. The case appears to me to be the same, as indeed I suggested during the argument, as if the prisoner had left a watch at a watchmaker's to be repaired, and afterwards goes to the watchmaker's, sees his watch hanging up behind the counter and another watch of greater value and belonging to another person hanging beside it, and upon his asking for his watch the shopman by mistake hands him the watch belonging to another; he sees his own watch, he knows that the watch handed to him does not belong to him, but is the property of another, and the shopman has no authority whatever to deliver the watch of another to him. I have no doubt, therefore, that one who had so received and taken away another man's property would have been guilty of larceny; that the shopman in such a case, and the clerk in this case, is

(1) Law Rep., 1 C. C., 150.

in the condition of a mere stander by who, without authority, and by mere mistake hands to him a chattel which he sees before him.

Even *Reg. v. Prince* ⁽¹⁾ may be said to be founded on a fiction, for it is not true that the banker had authorized his clerk to pay his money to a forged check; but the fiction is more undisguised and palpable when it is asserted that the clerk was authorized by *the postmaster-general to pay the sum of 8*l.* to a man [51] who had presented an order or warrant for 10*s.*; and I must take leave to record my deliberate opinion that this creating of fictions, which, as the term imports, is the assuming to be true that which is untrue, and of which the direct consequence is to defeat justice, is a practice which in administering the law ought not to be extended. Moreover the case is further distinguishable from *Prince's Case*, on the ground of the decision in *Reg. v. Longstreth* ⁽²⁾ where a carrier's servant delivered a parcel to one who received it *animo furandi*, knowing it not to be his own, and it was held that he had no authority to deal with the property in the goods, but only with the possession, and that the receiver was guilty of larceny. I think that decision governs the present case, and conclusively shows that if a servant delivers to the wrong person a chattel which it was no part of his duty and which he had no authority to deliver to any but the owner, and the receiver takes it, knowing that it is not his own but belongs to another, and *animo furandi*, such receiver, although the delivery is made in the ordinary performance of the duty of the servant, is guilty of larceny.

Upon these grounds I think the conviction should be affirmed.

PIGOTT, B. I agree in the judgment of the majority of the court, except that I do not adopt the reasons which are there assigned for holding that the mistaken intention of the clerk did not, under the circumstances here, prevent the case from being one of larceny on the part of the prisoner. I quite accede to that proposition, but my reason is that, in the view I take of the facts, the intention and acts of the clerk are not material in determining the nature of the prisoner's act and intent, because the transaction between them stopped short of placing the money completely in the prisoner's possession, and could in no way have misled the prisoner.

The case states that the clerk placed the money on the counter. He then entered the amount of it in the prisoner's book and stamped it. This, no doubt, gave the prisoner the opportunity of taking up the money, and he did so in the presence of the clerk; but before doing so he must have seen by the amount that the clerk was in error, and that the money

⁽¹⁾ Law Rep., 1 C. C., 150.

⁽²⁾ 1 Mood. Cr. C., 187.

52] could not really be *intended in payment of his order, and therefore was not for him, but for another person. It was with full knowledge of this mistake that he resolved to avail himself of it, and in fact to steal the money. The interval afforded him the opportunity of conceiving, and he did in fact conceive, the *animus furandi*, while as yet he had not got the money in his manual possession.

The dividing line may appear to be a fine one, but it is, I think, very distinct and well defined in fact, for it was with this formed intention in his mind that he took possession of the money. If complete possession had been given by the clerk to the prisoner, so that no act of the latter was required to complete it after his discovery of the mistake and his own formed intention to steal it, I should not feel myself at liberty to affirm this conviction. In that case the prisoner would have done nothing to defraud the clerk, and the latter, intending (to the extent to which he had such intention) as much to pass the property as the possession in the money, there would be nothing to deprive the matter of the character of a business transaction fully completed.

I desire to adhere to the law as stated in the 3d Institute, page 110 : "The intent to steal must be before it cometh to his hands or possession, for if he hath the possession of it once lawfully, though he hath *animus furandi* afterwards and carrieth it away, it is no larceny." But the facts satisfy me, and the jury have found upon them, that the prisoner had the *animus furandi* while the money was yet on the counter, and that at the moment of taking it up he knew the money to be the postmaster general's. The case is therefore very much like that of a finder, who, immediately on finding it, knows, or has the means of knowing, the owner, yet determines to steal it⁽¹⁾. The same facts satisfy the requirements in the definition of larceny, that the taking must be *invito domino*. The loser does not intend to be robbed of his property, nor did the clerk in this case, and the prisoner's conduct is unaffected by the clerk's apparent consent in ignorance of its real nature. I affirm the conviction.

MARTIN, B. I am of opinion that the prisoner was not guilty of larceny. I have had an opportunity of reading the judgments 53] *prepared by my brothers Bramwell and Cleasby, and I think their reasoning both unanswered and unanswerable. [His lordship stated the facts, and proceeded :] I think both on principle and authority there has been no larceny.

As to authority, the act of the accused in *Reg. v. Prince* ⁽²⁾ was a grosser act, and more akin to larceny than that of the prisoner in this case; yet it was held not larceny. I defy any

⁽¹⁾ 2 Russell on Crime, 4th ed., p. 169. ⁽²⁾ Law Rep., 1 C. C., 150.

man to explain to any one not a lawyer the difference between the two cases. The distinction seems to me worthy of an ancient casuist.

And as to principle. It is true that in some cases the sound principle has been departed from. But the true principle is that laid down by Lord Coke in the 3d Institute, p. 107: "Larceny, by the common law, is the felonious and fraudulent taking and carrying away by any man or woman, of the mere personal goods of another, neither from the person, nor by night in the house of the owner." And in examining this definition in detail, he says: "Secondly, it must be an actual taking; for an indictment, *quod felonice abduxit equum*, is not good, because it wanteth *cepit*. By taking and not bailment or delivery, for that is a receipt and not a taking." The same principle is laid down in 2 Russell on Crimes, p. 152, 4th edit. by Greaves: "There must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass. If, therefore, there be no trespass in taking the goods, there can be no felony in carrying them away." Now I am clearly of opinion that in this case there was no trespass, and that in the old stricter days of pleading, if an action had been brought it must have been an action of trover not trespass. I regret that in some cases there has been a departure from the old rules; and though I should follow, and should be bound to follow, these cases in any case to which their authority applied, in a doubtful case I think the true course is to have recourse to the old and settled principles of the law.

BRAMWELL, B. As the prisoner has now undergone his nominal sentence, I should think it better that the small minority in this case, of whom I am one, should give up their opinions to the majority, if the case turned on its own particular circumstances *and no principle was involved. But in my [54 opinion great and important principles not only of our law but of general jurisprudence arise here, on which I feel bound to state my views.

It is a good rule in criminal jurisprudence not to multiply crimes, to make as few matters as possible the subject of the criminal law, and to trust as much as can be to the operation of the civil law for the prevention and remedy of wrongs. It is also a good rule not to make that a crime which is the act, or partly the act, of the party complaining: *Volenti non fit injuria*: As far as he is willing, let it be no crime. Here the taking was consented to. This is undoubtedly a rule of the English common law. Obtaining goods by false pretenses was no offense at common law. Ordinary cheating was not. Embezzlement, &c., by servants was not larcenous. Breaches of trust by trustees

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and bailees were not. So also fraudulently simulating the husband of a married woman, and having connection with her was not. And most particularly was and is this the case in larceny, for the definition of it is that the taking must be *invito domino*.

Whether this law is good or bad is not the question. We are to administer it as it is. I think those statutes that have made offenses of such matters as I have mentioned improved the law, because the business of life cannot be carried on without trusting to representations that we cannot verify, and without trusting goods to others in such a way that the owner loses all power of watching over them; and it is reasonable that the law should protect persons who do so, by making criminals of those who abuse that confidence. But something was to be said in favor of the old law, viz., that the opportunity for the crime was afforded by the complainant. Further, there is certainly a difference between the privy taking of property without the knowledge of the owner, or its forcible taking, and its taking with consent by means of a fraud. The latter, perhaps, may properly be made a crime; but it is a different crime from the other taking.

I say, then, that on principles of general jurisprudence, on the general principles of our law, and on the particular definition of larceny, the taking must be *invito domino*. That does not mean contrary to or against his will, but without it. All he need be is *involuntarius*. This accounts for how it is that a finder of a chattel [55] may be guilty of larceny. The *dominus* is *involuntarius*. So in the case of a servant who steals his master's property. There are certain cases apparently inconsistent with this, but which are brought within the rule indeed, but by reasoning which ought to have no place in criminal law — I mean such cases as where a carrier broke bulk and stole the contents or part, and was guilty of larceny, but would not have been had he taken the whole package, and cases where possession was fraudulently obtained, *animo furandi*, from the owner, who did not intend to part with the property. In such cases it has been held that the breach of trust by the carrier in breaking bulk re-vested the possession in the owner; and in the other case the obtaining of possession was a fraud, and so null; and that therefore in such cases the possession reverted to or remained in the true owner, and so there was a taking *invito domino*. So also cases where the custody is given to the alleged thief, but not possession or property, as when the price of a chattel delivered is to be paid in ready money: *Reg. v. Cohen*.⁽¹⁾ These are not exceptions to the rule, but are brought within it by artificial, technical, and unreal

(¹) 2 Den. Cr. C., 249.

reasoning. But where the *dominus* has voluntarily parted with the possession, intending to part with the property in the chattel, it has never yet been held that larceny was committed, whatever fraud may have been used to induce him to do so, nor whatever may be the mistake he committed; because in such a case the *dominus* is not *invitus*. So also where the possession has been parted with in such way as to give the bailee a special property: see 2 Russell on Crimes, 4th ed., p. 191, citing 2 East, P. C., p. 682; *Reg. v. Smith*⁽¹⁾; *Reg. v. Goodbody*.⁽²⁾ It is not necessary that the property should pass, the intent it should is enough: see *Rex v. Coleman*.⁽³⁾

But it is argued that here there was no intent to part with the property because the post office clerk never intended to give to Middleton what did not belong to him. A fallacy is involved in this way of stating the matter. No doubt the clerk did not intend to do an act of the sort described and give to Middleton what did not belong to him, yet he intended to do the act he did. What he did he did not do involuntarily nor accidentally, but on *purpose. See what would follow [56 from such reasoning. A intends to kill B; mistaking C for B, he shoots at C and kills him. According to the argument, he is not guilty of intentional murder; not of B, for he has not killed him; not of C, for he did not intend to kill him. There is authority of a very cogent kind against this argument. A man in the dark gets into bed to a woman, who, erroneously believing him to be her husband, lets him have connection with her. This is no rape, because it is not without her consent, yet she did not intend that a man not her husband should have connection with her. I have noticed this above as another illustration of how the common law refuses to punish an act committed with the consent of the complainant.

To proceed with the present matter. If the reasoning as to not intending to give this money is correct, then, as it is certain that the post office clerk did not intend to give Middleton 10s., it follows that he intended to give him nothing, that cannot be. In truth, he intended to give him what he gave, because he made the mistake. This matter may be tested in this way: A tells B he has ordered a wine merchant to give B a dozen of wine, B goes to the wine merchant, *bonâ fide* receives, and drinks a dozen of wine. After it is consumed, the wine merchant discovers he gave B the wrong dozen, and demands it of B, who, having consumed it, cannot return it. It is clear the wine merchant can maintain no action against B, as B could plead the wine merchant's leave and license. But it is

⁽¹⁾ 2 Russell on Crimes, 4th ed., p. 191. ⁽²⁾ 2 East P. C., 672.

⁽³⁾ 8 C. & P., 665.

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said that if B knew of the mistake, and took the wine *animo furandi*, then he would have taken it *invito domino*; so that whether the *dominus* is *invitus* or not depends not on the state of his own mind, but of that of B.

It is impossible to say that there was a taking here sufficient to constitute larceny because the money was picked up, but that if it had been put in the prisoner's hand, there was not such a taking.

But for the point, then, I am about to mention, I submit the *dominus* was not *invitus*, that he consented to the taking, and that it was partly his act. No doubt the prisoner was a dishonest man, may be what he did ought to be made criminal, but his act was different from a privy or forcible taking; he was led into temptation; the prosecutor had very much himself to blame, and I certainly think that Middleton, if punished, 57] should be so on *different considerations from those which should govern the punishment of a larcenous thief.

But a point is made for the prosecution on which I confess I have had the greatest doubt. It is said that here the *dominus* was *invitus*; that the *dominus* was not the post office clerk, but the postmaster-general or the queen; and that therefore it was an unauthorized act in the post office clerk, and so a trespass in Middleton *invito domino*. I think one answer to this is, that the post office clerk had authority to decide under what circumstances he would part with the money with which he was intrusted. But I also think that, for the purposes of this question, the lawful possessor of the chattel, having authority to transfer the property, must be considered as the *dominus* within this rule, at least when acting *bonâ fide*. It is unreasonable that a man should be a thief or not, not according to his act and intention, but according to a matter which has nothing to do with them, and of which he has no knowledge.

According to this, if I give a cabman a sovereign for a shilling by mistake, he taking it *animo furandi*, it is no larceny; but if I tell my servant to take a shilling out of my purse, and he by mistake takes a sovereign, and gives it to the cabman, who takes it *animo furandi*, the cabman is a thief. It is ludicrous to say that if a man, instead of himself paying, tells his wife to do so, and she gives the sovereign for a shilling, the cabman is guilty of larceny, but not if the husband gives it. It is said that there is no great harm in this; that a thief in mind and act has blundered into a crime. I cannot agree. I think the criminal law ought to be reasonable and intelligible. Certainly a man who had to be hung owing to this distinction might well complain, and it is to be remembered that we must hold that to be law now which would have been law when such

a felony was capital. Besides, juries are not infallible, and may make a mistake as to the *animus furandi*, and so find a man guilty of larceny when there was no theft and no *animus furandi*. Moreover, *Reg. v. Prince* ⁽¹⁾ is contrary to this argument, for there the banker's clerks had no authority to pay a forged check if they knew it; they had authority to make a mistake, and so had the post office clerk. *And suppose in this [58 case the taking had been *bonâ fide* — suppose Middleton could neither write nor read, and some one had made him a present of the book without telling him the amount, and he had thought the right sum was given him — would his taking of it have been a trespass? I think not, and that a demand would have been necessary before an action of conversion could be maintained.

No doubt the cases on this point are difficult, but I think not inconsistent with this opinion. In *Reg. v. Longstreeth* ⁽²⁾ the servant had no authority to change property in the thing delivered. So in *Rex v. Wilkins* ⁽³⁾. In *Rex v. Small* ⁽⁴⁾ the servant had authority to part with the possession only if he got a good half-crown, and the prisoner knew that. So in *Reg. v. Stewart* ⁽⁵⁾, where the reasoning of Alderson, B., is very important. In *Sheppard's Case* ⁽⁶⁾ the servant had no authority to sell the mare, and the prisoner and his confederates knew the mare was not the property of the servant. So in *Hench's Case* ⁽⁷⁾, the servant had no authority to pass property. In *Rex v. Pearce* ⁽⁸⁾ there was no intention to pass property. As to *Reg. v. Kay* ⁽⁹⁾, the reasoning by which the conviction is justified is, I repeat, such as ought not to exist in any law, most especially not in the criminal law. Imagine a judge passing sentence thus: You have been properly convicted, and must be hung, because "assuming that the seller had more than a bare charge, and was the bailee of it, yet his special property as such did not put an end to the general property of the true owner; and when he sent the watch away to a third person, addressed to the true owner, intending such person to deliver it to the true owner, and that third person, the postmaster, received it for that purpose, the seller's possession and special property ceased, and the general property of the true owner became entirely unencumbered, and drew to it the possession, unless the postmaster became the bailee; but this he did not, for he had only a charge, and he became the servant of the true owner for the purpose of delivering it to him; and his possession was the

⁽¹⁾ Law Rep. 1 C. C., 150.

⁽²⁾ 1 Mood. Cr. C., 187.

⁽³⁾ 1 Leach. Cr. C., 520.

⁽⁴⁾ 8 C. & P., 48.

⁽⁵⁾ 1 Cox Cr. C., 174.

⁽⁶⁾ 9 C. & P., 121.

⁽⁷⁾ 2 Russell on Crimes, 4th ed., p. 215.

⁽⁸⁾ 2 East, P. C., 603.

⁽⁹⁾ Dears. & B. Cr. C., 231; 26 L.J. (M.C.), 119.

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59] possession of the true owner, *and could not be divested by the tortious acts of the prisoner." But, as is said in the note, in that case there was no intention to part with the property.

On these grounds I think the conviction was wrong. I need not profess my respect for those whose opinions are the contrary, but I feel bound, as I have said, to express mine, because I think very important principles are involved, and because I think it desirable to show that though those whose opinion I share may be, and probably are, in the wrong, considering the numerous and weighty opinions the other way, there is more doubt in the case than has appeared to some, who seem to me to reason thus: The prisoner was as bad as a thief (which I deny), and being as bad, ought to be treated as one (which I deny also). To such reasoners I give the recommendation contained in an excellent article in the *Law Times* of the 25th of January, 1873, p. 228, where it is said, "a metropolitan county court judge might with advantage read and inwardly digest Paley's *Moral and Political Philosophy*, or some other approved treatise, in which the necessity for positive rules of general application, the doctrine of particular and general consequences, and the superior importance of and regard due to, general consequences are clearly expounded.

BRETT, J. This case has been considered in three different ways. It has been said that the proper inference of fact to be drawn from the facts stated is, that the prisoner took and carried away the money without any consent to his so doing by the clerk, who was present; and that in such case the same rule of law is applicable as would be if the prisoner had taken and carried away the money in the absence of the clerk, and that the prisoner was therefore properly convicted. It has been said that the facts which are stated show that, as matter of fact, the clerk, in this case, had no general authority to part with the property in the money entrusted to him on behalf of the postmaster-general, but only a limited authority to part with a particular sum of money to the prisoner, which was not the sum of money he did part with, or to hand a sum similar to that which he in fact handed to the prisoner to some one else and not to the prisoner, and that, consequently, the prisoner was by law properly convicted of larceny, even though the clerk intended the prisoner *to take and keep the money, or, in other words, even though the clerk intended to part with both the possession of and the property in the money. It has been said that, even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the postmaster-general if he had been present, and even though the clerk intended to part with the possession

of and property in the money, yet that the prisoner was properly convicted, because no property in the money did, in point of law, at any time pass to the prisoner.

Any difference of opinion as to the first proposition can only arise upon a difference of view as to the proper inference of fact to be drawn. And I think also that the only difference of opinion with regard to the second proposition is a difference as to the true interpretation of the clerk's authority as matter of fact. But the difference as to the last proposition is a difference as to the criminal law. The difference of opinion which has arisen upon that proposition makes it necessary, as it seems to me, to refer to the definition of larceny, and to point out the exact part of that definition which is in question. The definitions which have been generally, and until now, I think, universally, accepted, are that larceny consists in "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner; and again, "the felonious taking the property of another without his consent and against his will with intent to convert it to the use of the taker." The indictment for larceny is invariably founded upon these definitions, and comprises by necessary inference, if not in express terms, every part of them. It has always been held that each allegation of each part of these definitions is a material allegation in the indictment, and that every one of such allegations must be proved. Where criminal law is so accurately and so mercifully administered as it is in England, and with so firm a determination that no man shall be convicted of crime unless the prosecutor can prove that the case is brought in every particular within the recognized or enacted definition of the crime, it was to be expected that there would be, and it is the fact that there have been, critical decisions on every part of the definition of the crime of larceny. To some people, such [61] decisions appear to be subtle, to others, carefully and rightly accurate. One part of the definition is, that the taking relied upon as the stealing should be a taking without the consent and against the will of the owner. That is the part of the definition which is in question in this case.

It has always been held to be a necessary part of the definition: "Besides the *animus furandi*, it is necessary that the taking of the goods should also be without the consent of the owner, *invito domino*." This is of the very essence of the crime of larceny as well as essential in robbery: 2 Russell on Crimes, by Greaves, p. 189, 4th ed. The cases quoted are, as to robbery,

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Rex v. McDaniel ⁽¹⁾ and, as to larceny, *Rex v. Egginton* ⁽²⁾. Where the taking which is alleged to be felonious has occurred without the knowledge of the owner or of the person in charge, no difficulty can arise upon this part of the definition. The difficulties which have arisen have been where the goods have been delivered to the prisoner, or have been taken by the prisoner, with the consent of the owner or of the person in charge. In such cases a distinction has been made between the terms "delivery," "possession," and "property."

Where the goods are obtained by the prisoner, by willing delivery of them to him by the owner, the first proposition of law which has been affirmed is as follows: If it appear that although there is a delivery by the owner in fact, yet there is clearly no change of property nor of legal possession, but the legal possession still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made. Thus, if a person to whom goods are delivered has only the bare charge or custody of them, and the legal possession remains in the owner, such person may commit larceny by a fraudulent conversion of the goods to his own use. The next received proposition is thus stated: Where there is a delivery of the goods by the owner, it is a settled and well-established principle that, if the owner part with the property in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured.

And according to the common law, if the owner had not parted with the property in the goods, but only with the possession of them, the question of larceny remains open, and depends on the fact whether at the time of the alleged felonious taking the owner parted with the possession of the goods in such a manner and to such an extent as to exclude the idea of trespass. If the possession be obtained by fraud, there may be larceny, assuming that the other parts of the definition are fulfilled. If the possession be obtained without fraud, the taking by which the possession is obtained cannot be treated as a taking by trespass, and consequently not as a taking without the consent of the owner.

The propositions thus expressed leave open a question as to whether they mean the property in the goods has passed in consideration of law, or whether they mean that it was the intention of the owner that the property should pass. Now they are addressed to the question whether the thing alleged to have been stolen was taken without the consent of the owner. Consent or non-consent is an action of the mind; it consists exclusively of the intention of the mind. These propositions,

⁽¹⁾ *Fost.*, 121.

⁽²⁾ 2 *Leach*, Cr. C., 918.

therefore, are treating of a question of intention. If it be said that a man intends to part with the property in a thing which he delivers to another, the meaning of the words is that he intends that the other should take the thing and keep it as his own; and it seems a contradiction in sense to say that the thing so delivered is taken from him without his consent. It seems to follow, that the real meaning of the propositions, when they speak of the owner parting with possession, or parting with the property, is as if they were written "if the owner intend to part with the possession, or intend to part with the property." All the cases are consistent with this view, though it is not expressed in terms in all. In *Reg. v. Harvey* ⁽¹⁾, Alderson, B., asked the jury whether the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money or make a bargain. In *Reg. v. Johnson* ⁽²⁾, the jury found, under direction, that the prosecutor did not intend to part with the property in the check. In *Rex v. Parkes* ⁽³⁾, the question left was whether there was a sale by Mr. Wilson and a delivery of the goods with the intent to pass the property. The jury found that Mr. Wilson did not intend to give credit. The conviction was *indeed set aside, but on the ground, [63 as I apprehend, that there was no evidence to justify the finding of the jury. In *Reg. v. Nicholson* ⁽⁴⁾, the conviction was held to be wrong by the judges, on a case reserved, on the ground that the property in the post bills and cash was parted with by the prosecutor under the idea that it had been fairly won. The ground of the judgment seems to me to be the intention or idea of the prosecutor. In the case of *Rex v. Adams* ⁽⁵⁾, it seems to me impossible to say that any property in the hat passed to the prisoner in consideration of law. The hat was delivered by the owner to an innocent messenger of the prisoner's, upon an assertion that he, the messenger, was sent by Paul. No property passed to Paul, because there was no delivery to him or to an agent of his. No property passed in law to the prisoner, because there was no intention that he should have the hat. But the act of taking relied on was the delivery of the hat by the prosecutor to the messenger, and the prosecutor intended to part with the property in the hat, or, in other words, that it should be taken away and kept. The judges, on a case reserved, held that there could be no felony. The decisions in the cases of *Rex v. Davenport* ⁽⁶⁾ and *Rex v. Savage* ⁽⁷⁾,

⁽¹⁾ 9 C. & P., 353.

⁽²⁾ 2 Den. Cr. C., 310; 21 L. J. (M.C.), 82.

⁽³⁾ 2 Leach, Cr. C., 614.

⁽⁴⁾ 2 Leach, Cr. C., 610.

⁽⁵⁾ 2 Russell on Crimes, 4th edit., p. 200.

⁽⁶⁾ 2 Russell on Crimes, 4th edit., at p. 201.

⁽⁷⁾ 5 C. & P. 143; 2 Russell on Crimes, 4th edit., at p. 201.

seem to me to be founded entirely on discussions and considerations as to the intention of the prosecutor to pass the property.

In *Rex v. Atkinson* ⁽¹⁾ the decision of the judges upon a case reserved is in terms that there was no felony, as it appeared that the property was intended to pass by the delivery of the owner. In the last case upon this point, the case of *Reg. v. Prince* ⁽²⁾, the proposition of law is thus stated by Blackburn, J.: "If the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offense of obtaining another's property from amounting to larceny, and where the servant has an authority coequal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it. 64] The question has always been a *question left to the jury, and has never hitherto been treated as a difficult question of the laws of property to be ruled by the judge. There is no trace in the books of the treatment now sought to be applied. The preamble to the statute 33 Hen. 8, c. 1, draws the distinction between goods taken by stealth 'and goods delivered by the owner willingly on being deceived by false tokens.' On consideration, then, of the authorities and of the part of the definition with which they dealt, and of the principle, I am of opinion that the proposition of law which would have been applicable in this case if the owner himself had been present is, when accurately stated, that where there is a delivery of the goods by the owner there can be no felony if the owner intend to part with the property in the goods, however fraudulent the means by which such delivery was procured."

When the delivery is made by a servant or agent of the owner, and the servant or agent has an authority to pass the possession of and the property in the goods as if the owner were present, the same rule is applicable as if the delivery had been made by the master: *Rex v. Jackson* ⁽³⁾ and *Reg. v. Prince*. ⁽⁴⁾ But if the delivery be by a servant or agent whose authority is limited, extending only to pass the possession and not to pass the property, then the proposition applicable is that which applies when the master delivers only the possession and not the property. Although the servant deliver the goods, intending to pass both possession and property, the prisoner may be convicted of larceny if he obtained the delivery by fraud: *Rex v. Longstreeth* ⁽⁵⁾, and many other cases: just as if by fraud he obtained delivery from the owner who intended by such de-

⁽¹⁾ 2 East, P. C., 678.

⁽²⁾ Law Rep., 1 C. C., 150.

⁽³⁾ 1 Mood. Cr. C., 149.

⁽⁴⁾ Law Rep., 1 C. C., 150.

⁽⁵⁾ 1 Mood. Cr. C., 137.

livery to give possession only, and not to pass the property. Such I believe to be the propositions of law which have been acted upon by a long series of most able and careful judges, and which, therefore, the present judges, in my opinion, have no authority to overrule.

It follows that I cannot agree with a judgment which decides that even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the postmaster-general if he had been present, and even though *the clerk intended to part with the posses- [65 sion of and property in the money, yet that the prisoner was properly convicted. I think that such a judgment is founded upon and enunciates a wrong proposition of law. Upon the assumptions of fact thus stated I am of opinion that a prisoner could not be convicted according to law of larceny.

But if the clerk had only a limited special authority to part with only the possession of the money entrusted to him, or a limited special authority to part with the property in a different sum from that which he delivered to the prisoner, or a limited special authority to part with a similar sum to that which he delivered to the prisoner, not to the prisoner, but to another person; then I am of opinion that the prisoner, upon the assumption that the other parts of the definition of larceny were proved, was properly convicted of taking the money without the consent of the postmaster-general, and properly convicted of larceny. This reduces the difference of opinion as to the first proposition which has been stated in this case to a difference of opinion as to what was the intention of the clerk with regard to delivering the money, and, as to the second proposition, as to what was the authority in fact of the clerk.

It seems to me that with regard to passing the possession of and property in the money entrusted to him he had the same authority as any other bank clerk. If he acted with strict accuracy his duty was to part with so much money as he was directed to part with by a genuine warrant, and to pay such sum of money to the person mentioned in such warrant. But he had authority to part not with any specific money, but with any of the money entrusted to him to any one of all the persons who should properly present a genuine warrant. That seems to me to be a general authority. To all such persons he had authority to give possession of the money in order that they might keep it, that is to say, he had authority to pass to all such persons the possession of and the property in the money which he handed to them.

It seems to me therefore, that as to passing the possession of and property in the money which he should deliver, he had a

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general authority to deal with the money as if in the place of the owner. It seems to me that the clerk intended to pass to the man who stood before him, that is to say the prisoner, the possession of *and the property in the whole of the money which he laid on the counter for the prisoner to take up and entered into the prisoner's book as paid to the prisoner. And it seems to me to follow that the prisoner, notwithstanding his fraudulent knowledge of the clerk's mistake, and his fraudulent reticence, and his fraudulent acceptance of what he knew was not due to him, cannot legally be convicted of larceny.

I think, therefore, that the conviction was wrong.

CLEASBY, B. The case is not affected by the acts of parliament extending the criminal responsibility for larceny to bailees and others, because the prisoner was clearly not a bailee, so as to be guilty by subsequently converting the money to his own use, and he does not come within any other act of parliament. We have, therefore, to deal with a case in which a crime is charged which under the old law would have been punishable with death, and in early times generally received that punishment. The punishment was so severe, that the crime was strictly defined, and from the earliest times was not committed by fraudulently dealing with or appropriating the property of others, but was only committed when the property was taken by the accused; and it must be taken fraudulently, without the consent of the owner. It is laid down in Foster's Crown Law, p. 123: "It is of the essence of the offense of robbery and larceny that the goods be taken against the will of the owner." Coke, in the 3d Institute, under the head of Larceny or Theft, p. 107, quotes the definition in the Mirror of Justice to the above effect, and he then gives the explanation of the words in the Mirror as follows, quoting from the translation: "It is said a taking, for bailing or delivery is not in this case." And Coke himself says afterwards, p. 107: "Secondly, it must be an actual taking: . . . by taking, and not bailment or delivery, for that is a receipt, and not a taking, and therewith agreeth Glanvil, *Furtum non est ubi initium habet detentionis per dominum rei.*"

This continues the law, except so far as altered by statute. But the taking does not necessarily mean a taking by force or surreptitiously, and the cases as to what constitutes a taking occupy nearly one hundred pages in Russell on Crimes, vol. ii., [67] from p. 152, *4th ed. They seem to establish, first, that where delivery is fraudulently obtained from any person having no authority to deal with the property, it is a taking from the owner. The instances of this are obtaining delivery from a mere servant by a false representation of the master's orders: obtaining delivery from a carrier whose only authority is to

change the possession from A to B, by a false representation of being B. Another instance, more like the present, because there is a mistake, where a person leaves his umbrella, or cloak, or watch, with any person to be returned on application, and he afterwards fraudulently identifies as his own a more valuable umbrella or cloak belonging to another person. This would be a taking, because the parties had no transaction or dealing connected with property, the person in charge having only an authority to return to each person his chattel.

Secondly, the cases establish that; when the owner himself delivers them, but only for the purpose of some office or custody, as of a man delivering sheep to his shepherd (an instance put by Coke), if the shepherd who has them in his charge fraudulently converted them to his own use, it would be a taking, because the right of possession (much less of property), was not for an instant changed.

But the cases also establish that, where there is a complete dealing or transaction between the parties for the purpose of passing the property, and so the possession parted with, there is no taking, and the case is out of the category of larceny.

Considering what the penalty was, there was nothing unreasonable or contrary to the spirit of our laws in drawing a dividing line, and holding that, whenever the owner of property is a party to such a transaction as I have mentioned, such serious consequences were not to depend upon the conclusion which might be arrived at as to the precise terms of the transaction, which might be complicated, and uncertain, and difficult to ascertain. And this agrees with Hawkins's opinion: Pleas of the Crown, Book 1, c. 83, s. 3; where (in dealing with the question of what shall be a felonious taking), after pointing out that, unless there has been a trespass in taking goods, there can be no felony in carrying them away, he adds: "And herein our law differs from the civil, which, having no capital punishment for bare thefts, deals with offenses of *this kind (that is, [68 fraudulent appropriation of things not taken), as in strict justice most certainly it may; but our law, which punishes all theft with death if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chooses to deal with them as civil, than criminal offenses."

I believe the rule is as I have stated, and that it is not limited to cases in which the property in the chattel actually passes by virtue of the transaction. I have not seen that limitation put upon it in any text book on the criminal law, and there are, unless I am mistaken, many authorities against it. The cases show, no doubt, beyond question, that where the transaction is of such a nature that the property in the chattel actually passes

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(though subject to be resumed by reason of fraud or trick), there is no taking, and therefore no larceny. But they do not show the converse, viz., that when the property does not pass, there is larceny. On the contrary, they appear to me to show that where there is an intention to part with the property along with the possession, though the fraud is of such a nature as to prevent that intention from operating, there is still no larceny. This seems so clearly to follow from the cardinal rule that there must be a taking against the will of the owner, that the cases rather assume that the intention to transfer the property governs the case, than expressly decide it. For how can there be a taking against the will of the owner, where the owner hands over the possession, intending by doing so to part with the entire property?

As far as my own experience goes, many of the cases of fraudulent pretenses which I have tried have been cases in which the prisoner has obtained goods from a tradesman upon the false pretense that he came with the order from a customer. In these cases no property passes either to the customer or to the prisoner, and I never heard such a case put forward as a case of larceny. And the authorities are distinct, upon cases reserved for the judges, that in such cases there is no larceny. In *Reg. v. Adams* ⁽¹⁾, the prisoner was indicted for stealing a quantity of bacon and hams, and it appeared that he went to the shop of one Aston, and said he came from Mr. Parker for some hams and bacon, and produced the following note, purporting to be signed by Parker :

[69] “ *Have the goodness to give the bearer ten good thick sides of bacon, and four good showy hams, at the lowest price. I shall be in town on Thursday next, and will come and pay you.

“ Yours respectfully,
“ T. Parker.”

Aston, believing the note to be the genuine note of Parker (who occasionally dealt with him), delivered the articles to Adams. The jury convicted, but upon a case reserved, upon the question whether the offense was larceny, the judges were all of opinion that the conviction was wrong. *Rex v. Coleman* ⁽²⁾ is to the same effect. In that case the prisoner got some silver as change, falsely pretending to come from a neighbor for it; and it was held not to be a case of larceny. *Rex v. Atkinson* ⁽³⁾ was a similar one, and the prisoner was convicted; but on a reference to the judges after conviction, all present held that it

⁽¹⁾ 1 Den. Cr. C., 88.

⁽²⁾ 2 East., P. C., p. 672.

⁽³⁾ 2 East., P. C., p. 678.

was no felony, on the ground that the property was intended to pass by the delivery of the owner.

There is also a large class of cases in which it has been held that there was no taking so as to constitute larceny, where the possession had been wholly parted with (not by way of mere charge or custody, as in the case of the shepherd or butler), though there was no intention to pass the property. And the distinction has been drawn between delivering yarn to a weaver to work upon the employer's premises, in which there is no complete parting with the possession, and the delivery to a weaver to take home and work up there. In the latter case the possession is wholly parted with, and (previous to recent legislation) there could be no larceny by subsequent appropriation⁽¹⁾. So the giving cloth to a tailor to make into a coat. In like manner, delivering a horse to be agisted at so much a week: *Reg. v. Smith* ⁽²⁾; or cattle to a drover to be sold on the road if he could do so; *Reg. Goodbody* ⁽³⁾. In all these cases, the legal possession being wholly transferred, there could be no taking in the nature of a trespass, and they were not formerly cases of larceny.

I will only further refer to the case of *Reg. v. Barnes* ⁽⁴⁾, and I *do so from its resemblance to the present case. The [70 prisoner was indicted for larceny. He was clerk to the prosecutors, and it was his duty to pay dock and town dues. He fraudulently represented that a sum of 3*l.* 10*s.* 4*d.* was required to make the payments, when only 1*l.* 3*s.* was wanted, and obtained the larger sum, intending to appropriate the difference to his own use. Upon a case reserved it was held not to be larceny. The main difference between that case and the present is that the prisoner there dishonestly made use of falsehood to obtain the larger amount. In the present case he obtained the larger amount by dishonestly omitting to correct the mistake of the postmistress. In both cases the overpayment was made under a mistake of the facts.

In my opinion all the authorities warrant the proposition of law as laid down by my brother Blackburn in the last reported case on the subject, *Reg. v. Prince* ⁽⁵⁾ (which was, like the present, a case of payment under a mistake of fact). "If the owner intended the property to pass, though he would not have so intended had he known the real facts, that is sufficient to prevent the offense of obtaining another's property from amounting to larceny, and where the servant has an authority co-equal with

(1) 2 East., P. C., p. 682.

(2) 2 Den. Cr. C., 50; 20 L. J. (M.C.),

(3) 2 Russell on Crimes, 4th ed. at p. 34.

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(4) Law Rep., 1 C. C., 150.

(5) 8 C. & P., 665.

the master's, and parts with his master's property, such property cannot be said to have been stolen, inasmuch as the servant intends to part with the property in it."

With those authorities before me, I cannot accept as the proper test, not the intention of the owner to deliver over the property (which is a question of fact), but the effect of the transaction in passing the property, which might raise in many cases a question of law. This appears to me to be a novelty at variance with the definition of larceny, which makes the mind and intent of the owner the test, and irreconcilable with the manner in which these cases have always been dealt with.

And it is of great importance to abide by cases already decided by the judges, because the law of larceny being the same in Ireland as in England, the decisions ought to be the same; and the judges in Ireland may feel themselves bound by adjudged cases (recognized in all the text books and long acted on), though we may assume to overrule them; and so there may be an undesirable divergence of opinion. And it must be borne 71] in mind that *the cases which must be overruled if this new test be adopted (*Rex v. Adams* ⁽¹⁾, *Rex v. Coleman* ⁽²⁾, *Rex v. Atkinson* ⁽³⁾), are not decisions of the Court for Crown Cases Reserved, but unanimous decisions of all the judges upon cases submitted to them.

However desirable it may be that the law should now be changed, I am not at liberty to set aside or qualify the rule of law so long settled, and to say that an acquisition of a chattel by dishonest means is now a felony. Nor do I feel myself at liberty to leave such a question to the jury. If the transaction is of the nature which I have mentioned, the dishonest mind of the person receiving is immaterial upon the charge of felony, and ought not therefore to be left to the jury; otherwise the jury would be misled by their disapproval of anything dishonest into the erroneous conclusion of a felonious intent to do that which is not a felony. But the person with whom the transaction takes place, and from whom the delivery is received, must be a person qualified to enter into the transaction, and capable of passing the property.

In the present case the transaction was with the clerk of the postmistress. The clerk was the person placed in the office for the purpose (*inter alia*) of making payments and taking receipts. He is called the clerk, and therefore his act, within the general scope of his authority, would be the act of the postmistress. But, it is suggested, that the postmistress was not in any sense the agent of the postmaster-general, but had in each case a

(¹) 2 Russell on Crimes, 4th ed., at p. 200.

(²) 2 East, P. C., p. 672.

(³) 2 East, P. C., p. 673.

separate and particular authority to make the payment. And upon looking into the act of parliament, 24 & 25 Vict. c. 14, I should not be prepared to decide this case upon the ground that the postmistress had a general authority, or more than a particular one, to make the payment of 10s. to the prisoner. And if, at the time when the payment was made, the postmistress or clerk had done some act wholly out of the authority, as, for instance, payment to a stranger, I should feel a difficulty in saying it must be regarded as the act of a person capable of passing the property in such a transaction. But upon this it is not necessary to give a decided opinion, because the prisoner was the person entitled to be paid the 10s. for which he applied under the order, and the authority was to pay to him that sum. The exercise of power in *making too large a payment on be- [72 half of the postmaster-general was, therefore, only excessive, and (according to the ordinary rule in the exercise of power) was valid, so far as it was within the power, the excess being clearly separable.

This is not the case of the postmistress being authorized to deliver one bag of money to one person and another bag of money to another person. In that case the prisoner knowingly getting the wrong bag would get something to which he had no color of title. The authority here is to enter into an account with the prisoner, by paying him a certain amount and making a corresponding alteration in the balance. And this is done; the payment is made and the corresponding alteration in the balance, but there is a mistake in the amount paid, and so in the balance, and it becomes really the ordinary case of payment by a banker's clerk by mistake. It appears to me quite impossible, with due attention to the facts, to regard the prisoner as a stranger intervening in a transaction between other parties. No other party was present or was named, and the prisoner entered and left the office in the same character, viz., that of payee, though he left it as payee of a larger amount than he was entitled to, and carried with him the book, which was an unanswerable proof that he was payee, and was payee of the larger amount.

The prisoner was, therefore, entitled to be paid the 10s. out of the money handed to him, and that being so, there is a technical objection to the conviction, that there are no particular chattels or pieces of money in respect of which the charge of larceny can be sustained.

But, independent of this technical objection, the duty of the prisoner, if he had acted as he ought to have done, was to have taken 10s. out of the amount, and to have handed the rest to the clerk. He ought, at the same time, to have handed back

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his book and had it corrected, because it charged him with the receipt of 8*l.* odd, but his omission to do this does not, in my opinion, involve him in the charge of larceny.

There was no mistake in the person, because the prisoner handed in his order and also his deposit book; and if the clerk had known him well it would have made no difference. He would still have paid him the wrong amount, because the same cause would have operated, looking at the wrong order.

73] *There was no mistake in the amount. I mean it was not the case of the clerk handing him a 100*l.* note when he intended to hand a 5*l.* note, or, unknowingly, two notes instead of one. He intended to pay the prisoner the particular sum; and it was a deliberate act, because he took the amount from a document, and completed the transaction by debiting the prisoner with that sum in his book. So that it was not like the case of a wrong sum being put down by mistake and the prisoner snatching it up and running away with it for the purpose of preventing the mistake from being set right.

The mistake was in the supposed amount of the prisoner's claim. The prisoner applied for 10*s.*, and the clerk thought he was entitled to more and paid him accordingly, and this overpayment might have been afterwards adopted by the postmaster, so as to make the prisoner chargeable with the balance. The clerk did not the less intend to make the payment which he deliberately made, because he was at the time under the influence of a mistake; he would not have intended to make the payment but for the mistake. Mistakes are constantly occurring, and few people can say that they have not acted under their influence, but their acts remain as acts done at the time, though their effects may be afterwards corrected. No doubt there was no intention to overpay the prisoner, that is, to produce the effect of overpayment; but the intention was to do the act of paying the larger sum, because it was thought to be a proper one.

This is the answer to one argument addressed to us, viz., that the prisoner took up what was intended for another, and not for him, and therefore there was a taking *invito domino*. The conclusion of law would be quite correct if it could be correctly said that the amount was intended for another. The clerk ought to have intended that amount for another, and would have done so, if he had properly informed himself of the facts; but, unfortunately for the prisoner, the clerk did not properly inform himself of the facts, and, therefore, he intended the prisoner to receive the larger amount. The clerk intended A to receive what he ought to have intended B to receive, but it was not the less his intention that A should receive what he handed over to him. There was only one transaction, and only two

parties to it, the clerk and the prisoner, and his fault was the work of an instant, *and might, to an ignorant and illiterate person, be connected with some confusion of mind, though the disparity of amount in this case would make a person of any sense at once see and correct the mistake.

I do not think a man ought to be exposed to a charge of felony upon a transaction of this description, which is altogether founded upon an unexpected blunder of the clerk. The prisoner was undoubtedly at the office for an honest purpose, and finds a larger sum of money than he demanded paid over to him and charged against him. A man may order and pay for certain goods, and, by mistake, a larger quantity than was paid for may be put in the package and he may take them away. Or he may pay in excess for that which is ordered and delivered. Is the person receiving to be put in the peril of a conviction for felony in all such cases, upon the conclusion which may be arrived at as to whether he knew, or had the means of knowing, and had the *animus furandi*? I think not; I think such cases are out of the area of felony, and, therefore, the *animus furandi* is inapplicable, and ought not to be left to the jury. And any conclusion, founded upon the finding of the jury upon a question which ought not to be left to them, must be erroneous, because the foundation is naught. I think the conviction was against law and ought to be quashed.

Conviction affirmed.

Attorney for prosecution: *The Solicitor to the Post Office.*

[Law Reports, 2 Crown, Cases Reserved, 74.]

May 31, 1873.

THE QUEEN V. REBECCA GOLDSMITH.

False Pretences — Receiving — Indictment — Aider by Verdict — 24 & 25 Vict. c. 96, ss. 88, 95—7 Geo. 4, c. 64, s. 21—14 & 15 Vict. c. 100, s. 25.

The prisoner was indicted, under 24 & 25 Vict. c. 96, s. 95, for unlawfully receiving goods knowing them to have been obtained by false pretences. The indictment did not set out the false pretences. At the trial, at the close of the case for the prosecution, it was objected, on behalf of the prisoner, that the indictment was bad, because it did not set out the false pretences. The prisoner was convicted:

Held, that the objection must be taken to have been made after verdict in arrest of judgment; and that after verdict the indictment was good.

CASE stated by the deputy recorder of London. At a session of the Central Criminal Court, held on Monday, *the [75 5th of May, 1873, Rebecca Goldsmith was tried, upon an in-

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dictment containing fourteen counts, for various misdemeanors. The thirteenth count was as follows :

" And the jurors aforesaid, upon their oath aforesaid, do further present that the said Rebecca Goldsmith afterwards, to wit, in the year of our Lord, 1872, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, unlawfully, did receive and have divers articles of jewelry, to wit (here followed a list of the goods alleged to have been unlawfully received), of the goods and chattels of the said Charles Drayson and others, which said goods and chattels, in the count aforesaid, had lately before then been unlawfully, and knowingly, and fraudulently obtained of and from the said Charles Drayson and others by means of certain false pretenses, with intent to defraud : She, the said Rebecca Goldsmith, at the time she so as aforesaid unlawfully received and had the same goods and chattels, then and there well knowing that the same goods and chattels had been obtained by means of certain false and fraudulent pretenses, with intent to defraud, as in this count before mentioned, against the peace of our said lady the queen, her crown, and dignity."

The fourteenth count was in the same form, for receiving goods belonging to another owner.

At the close of the case for the prosecution, Mr. Giffard, Q.C., and Mr. Poland, on behalf of the prisoner, objected that the 13th and 14th counts were bad, because they did not set forth the false pretenses by means of which the goods had been obtained, and that consequently it did not appear that those false pretenses were within the statute 24 & 25 Vict. c. 96, s. 88 (1). 76] *Mr. Metcalfe, Q.C., for the prosecution, contended, first, that it was unnecessary, in a substantive charge of receiving

(1) By 24 & 25 Vict. c. 96, s. 88: "Whosoever shall, by any false pretense, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor. . . ."

By s. 95: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor. . . ."

By 7 Geo. 4, c. 64, s. 21: " Where the offense charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by

any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offense in the words of the statute."

By 14 & 15 Vict. c. 100, s. 25: "Every objection to any indictment, for any formal defect apparent on the face thereof, shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

goods obtained by false pretenses, to set forth the specific false pretenses by which they had been obtained; secondly, that the allegation in the indictment that they had been unlawfully, knowingly, and fraudulently obtained by false pretenses, with intent to defraud, must be taken to mean that they had been obtained by false pretenses which were unlawful and fraudulent within the statute; and, thirdly, that even if it were necessary, as matter of form, to set out the false pretenses, yet the objection was too late, and ought to have been taken before the plea by virtue of 14 & 15 Vict. c. 100, s. 25.

The prisoner was found guilty on the 13th and 14th counts only, and, doubting whether these two counts were good in form, and also doubting whether, if they were not good, the objection was taken in proper time, the learned deputy recorder reserved for the decision of the court for consideration of Crown Cases the two questions:

First, whether the two counts were good in form, and, second, if they were not good, whether the objection was too late.

If the counts were bad, and the objection was in time, the conviction was to be annulled; but, if the counts were good, or the objection was too late, the conviction was to be affirmed.

Giffard, Q.C. (*Poland* with him), for the prisoner. An indictment for obtaining goods by false pretenses must set out the pretenses: *Rex v. Mason* ⁽¹⁾. And s. 95 of the Larceny Act, creating the offense of receiving, does so by express reference to s. 88, as to obtaining, and must be similarly construed. The 7 & 8 Geo. 4, c. 64, s. 21, does not help, for the words of the statute are not followed, the word "unlawfully" being omitted. *And the statute is to be read as if after "false pretenses" [77 there followed the words "of an existing fact"; 2 Russell on Crimes, 4th ed., p. 554, n. Nor does 14 & 15 Vict. c. 100, s. 25, apply, for this is not a formal defect. Every allegation in the indictment might be true and yet no offense be committed. He also cited 2 Hale. P. C., 192; *Sill v. The Queen* ⁽²⁾; *Reg. v. Wilson* ⁽³⁾; *Reg. v. Martin* ⁽⁴⁾; *Rex v. Turner* ⁽⁵⁾; *Rex v. Ryan* ⁽⁶⁾; *Rex v. Davis* ⁽⁷⁾; *Reg. v. Gray* ⁽⁸⁾.

Metcalfe, Q.C. (*Straight* with him), cited *Heymann v. The Queen* ⁽⁹⁾; *Reg. v. Blake* ⁽¹⁰⁾; *Nash v. The Queen* ⁽¹¹⁾; *Reg. v. Watkinson* ⁽¹²⁾; *Rex v. Gill* ⁽¹³⁾; *Sydsersff v. The Queen* ⁽¹⁴⁾.

⁽¹⁾ 2 T. R., 581.

⁽²⁾ 1 E. & B., 553; 22 L. J. (M.C.), 41.

⁽³⁾ 2 Mood. Cr. C., 52.

⁽⁴⁾ 8 Ad. & E., 481.

⁽⁵⁾ 1 Mood., Cr. C., 239.

⁽⁶⁾ 2 Mood., Cr. C., 15.

⁽⁷⁾ 1 Leach Cr. C., 65, n.

⁽⁸⁾ Leigh & Cave's Cr. C., 565; 33 L. J.

(M.C.), 78.

⁽⁹⁾ Law Rep., 8 Q. B., 102.

⁽¹⁰⁾ 6 Q. B., 126.

⁽¹¹⁾ 4 B. & S., 935; 33 L. J. (M. C.), 94.

⁽¹²⁾ 26 L. T. (N.S.), 853.

⁽¹³⁾ 2 B. & Ald., 204.

⁽¹⁴⁾ 11 Q. B., 245.

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BOVILL, C. J. That an indictment for obtaining goods by false pretenses must set out the false pretenses was long ago decided. The contention here is, that the present indictment for receiving goods knowing them to have been obtained by false pretenses is bad for not doing so also. It must be observed that no objection was taken before plea, but issue was joined and the jury charged. But at the close of the case for the prosecution, and before verdict, the present objection was taken. The learned judge who tried the case was not bound to give any effect to such an objection taken at that stage. If he thought the objection clearly a good one, he might have quashed the indictment. If he thought the matter doubtful he might leave the party to his writ of error, or reserve the point for this court. In this case the deputy recorder did not quash the indictment, but reserved the point for this court, not whether the indictment ought to be quashed, but whether the count is a good count. It is true the objection was in fact taken before verdict, but we can only give effect to it as an objection taken after verdict. The judge at the trial could have given effect to it only by quashing the indictment or arresting the judgment; 78] *and as no question is reserved as to quashing the indictment, we must treat it as a motion in arrest of judgment. I say this because this is not a case for annulling the conviction, which must stand. After the attention of the deputy recorder had been called to the matter, we must take it that he charged the jury properly; and after verdict, we must assume that the jury found correctly as to the matters alleged in the indictment.

Such being the mode in which the objection arises, the objection is that the 13th and 14th counts do not set out the false pretenses by which the goods were obtained which the prisoner is charged with receiving. That was the objection raised at the trial; and we ought to confine ourselves strictly to the question raised at the trial and reserved for this court. This objection does not appear upon the face of the counts, for so far as the words go the false pretenses might or might not be such as fall within the provisions of the statute. The worst that can be said of the indictment is, that it is uncertain. But the judge would be bound to direct the jury what kind of false pretenses are requisite to bring the case within the statute. Then the statute 24 & 25 Vict. c. 96, s. 95, makes it a misdemeanor to "receive any property the obtaining whereof is made a misdemeanor by the act, knowing the same to have been unlawfully obtained." And those words have reference to s. 85, by which "whosoever shall by any false pretense obtain from any other person any chattel, &c., with intent to defraud, shall be guilty of a misdemeanor." The section in question is a substantial

re-enactment of 7 & 8 Geo. 4, c. 29, s. 53, and under that there has been a uniform course of pleading precedents in the books, showing clearly that it has not been usual to set out the false pretenses in such an indictment. And we ought not to hold such a series of precedents to be wrong, without being very clear upon the point. But as here the question arises after verdict, the case is concluded by 7 Geo. 4, c. 64, s. 21, by which, "where the offense charged has been created by any statute, the indictment shall after verdict be held sufficient, if it describe the offense in the words of the statute." Here, so far as the objection taken at the trial and reserved for us is concerned, the words of the statute are followed.

Independently, however, of the statute, the case of *Heymann v. The Queen* ⁽¹⁾ is an authority to show that at common law [79] this indictment would be sufficient after verdict.

It was further argued that the objection taken was cured, as a formal defect, by 14 & 15 Vict. c. 100, s. 25. In the view I take of the case, it is unnecessary to decide this point. The objection, if a valid one at any time, is cured after verdict. The judgment cannot be arrested, but the conviction must stand.

BRAMWELL, B. The objection here raised is that the indictment shows no offense. In strictness the objection was taken at the wrong time. A question as to an indictment may be raised by demurrer, by motion to quash, or by motion in arrest of judgment. Had the present objection been taken on demurrer or motion to quash, I am not prepared to say the count would have been good. But upon principle, the defect, if any, is cured by verdict. The rule is laid down in Serjeant Williams' note to *Stennel v. Hogg* ⁽²⁾: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." In the present case, if on the trial of the principal offender, false pretenses had been proved amounting only to future promises or the like, is it to be supposed that the judge would have allowed the case to go to a jury? The case of *Rex v. Mason* ⁽³⁾ has been cited; but I agree with the remark of Mellor, J., in *Heymann v. The Queen* ⁽⁴⁾, that that case and the others like it are virtually overruled.

⁽¹⁾ Law Rep., 8 Q. B., 102.

⁽²⁾ 1 Notes to Saunders by Williams,
at p. 261.

⁽³⁾ T. R., 581.

⁽⁴⁾ Law Rep. 8 Q. B., at p. 103.

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We must take it that the objection raised at the trial was made with a *continuando*, so as to be available as a motion after verdict in arrest of judgment; otherwise we should have no jurisdiction. My ground of decision is that the defect, if any [80] there be, is cured *by verdict. If the matter were one in our discretion I should not arrest the judgment.

I think for the future it would be better that such objections should be formally taken by motion to arrest judgment.

CLEASBY, B. I think this case clearly falls within the rule which has been cited by my brother Bramwell from Williams' Saunders, and the principle laid down by the Queen's Bench in *Heymann v. Reg.* ⁽¹⁾. "It is a general rule of pleading at common law, and I think it necessary to say, where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases, where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict." This is at most the case of a defective averment, and it must be taken, after verdict, to have been proved in the only sense in which it ought to have been averred.

GROVE, J. I think the case falls within the rule referred to by my brothers Bramwell and Cleasby.

ARCHIBALD, J., concurred.

Conviction affirmed.

Attorneys for prisoner: *Lewis & Lewis.*

Attorneys for prosecution: *Wontner & Sons.*

(1) Law Rep., 8 Q. B., at p. 105.

CRIMINAL LAW CASES.

COURT OF QUEEN'S BENCH.

January 20, 21, and 29, 1878.

(Before COCKBURN, C.J., BLACKBURN, MELLOR, and LUSH, J.J.)

[12 Cox's Criminal Cases, 358.]

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Contempt of court—Speeches at public meetings—Pending trial—Collection of funds for defense—Vituperation of judge and attacks upon witnesses—Privilege of members of Parliament.

The defendant had been committed for perjury by the judge, who tried an ejectment in which he was claimant, and in which the *issue was the [359 question of his identity with a certain baronet alleged by the defendants to be dead. The jury, during the defendant's case, had expressed themselves satisfied that the claimant was not the person he swore he was, and he elected to be nonsuited. The grand jury at the Central Criminal Court found true bills against him for perjury and forgery; the prosecution removed the indictments by *certiorari* into this court; and it had been fixed, upon application of the attorney-general, that the trial should take place at bar next Easter term. The defendant and his friends, amongst whom were two members of parliament and one barrister-at-law, had held public meetings for the purpose of obtaining money for the defense at the forthcoming trial, and remarks had been made by the defendant and the three friends mentioned, imputing perjury and conspiracy to the witnesses for the defense at the trial of the ejectment, and prejudice and partiality to the lord chief justice of this court, who, they said had proved himself unfit to preside at the trial of the indictments. They also asserted the innocence of the defendant, and the injustice of his treatment.

Held, that the trial of these indictments was a proceeding of the court then pending; that, although the remarks at the meetings might be the subject of a criminal information, yet the parties who made them might also be prosecuted summarily for contempt of court; that these remarks indicated an attempt by means of vituperation to deter the lord chief justice from taking any part in the trial, and also by attacks on the witnesses themselves to influence the public mind and prejudice the jury; that they unwarrantably interfered with the even and ordinary course of justice; that it was no excuse that the motive or purpose for which the meetings were held was justifiable, nor that the attempt to interfere with the course of justice was ineffectual; that the proceedings were a gross contempt of court; and that it was the duty of the court to put a stop to them.

The members of parliament who made these remarks, when summoned to answer for contempt, apologized and submitted themselves to the court. They were, therefore, only fined 100*l.* each; but it was held that the court would not allow the privilege of the house of commons to prevent punishment by imprisonment of its members for a contempt in the administration of justice, if the occasion required it.

Upon the application of the prosecution, Mr. Guildford Onslow, M.P. for the borough of Guildford, and Mr. Whalley,

(1) Reported by M. W. McKELLAR, Esq., Barrister-at-Law

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M.P. for the city of Peterborough, had been summoned to answer a charge of contempt of court by endeavoring to prejudice the course of justice upon the trial of indictments which have been removed from the Central Criminal Court, but have not yet come to be tried. The defendant had been claimant in an ejectment, *Tichborne v. Lushington*, in the Court of Common Pleas, the only issue in which was the identity of the claimant [360] *with the person he alleged himself to be, viz., Sir Roger Charles Doughty Tichborne, Bart. The circumstances of the action are to be found reported in the case of *Tichborne v. Mostyn* (L. Rep. 8 C. P. 29; 26 L. T. Rep. 554.) The trial lasted 103 days, and during the case for the defense the jury expressed their opinion in opposition to the claimant's alleged identity, and the claimant elected to be nonsuited. Bovill, C. J., who tried the case, then committed the claimant for perjury, and upon his lordship's suggestion the prosecution was undertaken by the treasury. Subsequently true bills for perjury and forgery were found against him by the grand jury at the Central Criminal Court; and those true bills, which are the indictments in this case, were removed upon *certiorari* by the prosecution into this court. The trial of the defendant for perjury has, upon the application of the attorney-general, been fixed to be held at bar, and to be commenced during next Easter term. Defendant, who is on bail, has, with his friends, been addressing public meetings in various parts of the country, convened by them for the purpose of obtaining funds in aid of the defense at the forthcoming trial.

Two of these public meetings were held at St. James's Hall, in the county of Middlesex, on the 11th and 12th of December last. Mr. Onslow, Mr. Whalley, and the defendant were present on both occasions. On the 11th of December Mr. Whalley, who was in the chair, addressed the meeting, and introduced Mr. Onslow, who then addressed the meeting and spoke in these terms: "It may be as well that I should explain to you that our object in addressing the British public had its origin on these grounds. We were refused in the house of commons replies to questions we put to the ministers. Our mouths were shut in that house, and knowing, as we do, that we are supporting the right man in a good and honest complaint, we have nothing left but to appeal to public opinion. We don't ask you to say whether he is or is not Sir Roger Tichborne; but we ask you to say and believe that he is an Englishman, and, as an Englishman, that he is justly entitled to fair play, which is the birthright of every one of our countrymen. (Cheers.) Now, I maintain that in the late trial he did not receive the fair play he is entitled to. The longwinded speech of the

attorney-general, lasting twenty-one days (hisses), was never replied to, and we have a perfect right to assume that had Sergeant Ballantine been permitted to reply he would have turned the minds of the jury and of the public as much as they were turned by the attorney general. (Cheers.)"

Mr. Onslow concluded a long speech by saying that in the great undertaking in which they were engaged they had obtained information, and would bring forward witnesses on the trial, that would, if the claimant were treated with the justice he had a right to demand, lead to his honorable and triumphant acquittal.

At the second meeting, held on the next day, at which a Mr. Skipworth was in the chair, Mr. Whalley spoke thus: "There are then, gentlemen, in this case two questions. [361 In the first place is this man truly Sir Roger Tichborne? (Loud cries of 'Yes, yes.') In the second place is that fact known? Now, mark and observe this, because these are words which I speak with a due sense of the responsibility to those whom I meet in social life, to the house of commons, where I have and shall again pledge all that I have worked and labored for during twenty years on the strength of my convictions—is that fact, if fact it be, known to the attorney-general? Has it been known to him throughout this prosecution? Is it known to Her Majesty's government or to Mr. Gladstone, or, which is the same thing, have they given 100,000*l.*, or whatever other money they have given, out of your pockets, have they given that money to prosecute this man and to convict him of offenses without taking the ordinary and proper means at their command for ascertaining the fact whether he be really guilty of perjury or not?"

And again: "I have charged the Tichborne family, I have charged directly and in print the Doughtys, the Radcliffes, and the whole lot of them together, with knowing that he is the man, and combining in a conspiracy against him. (Loud cheers.) Now, ladies and gentlemen, you will naturally say how can we listen to such a Don Quixote as that? What a fool that man must be to throw himself into a quarrel that in no manner concerns him, merely as to the question whether this gentleman or somebody else is entitled to certain estates in Hampshire, and here it is, ladies and gentleman, that I come to the real question that concerns you and me and the hundreds of thousands of men that I have addressed throughout the country. Here we come now to the public question. Gentlemen, the time has not come when either I should be justified in speaking or you would be prepared to listen to those possibilities of conspiracy in a matter of this kind, which I do believe, it is my hope, my ex-

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pectation, the very object for which I exert myself in this case, will in due time become more fully developed and understood by the people of this country. What is the nature of this conspiracy? What is the origin? What are the grounds on which, six years ago, these people met in a drawing-room in London, and said we will defy the laws of England, we have these estates, here is the man, it is not expedient that this man should have these estates, we will keep them, we are strong enough in parliament, strong enough on the judicial bench, strong enough in society to defy the laws of England. (Cheers.) Gentlemen, I am not prepared to enter into that to the extent I feel it. I say that I live in the hope that the time will come when it will be quite legitimate to address you on the nature of that conspiracy against Sir Roger Tichborne which I state here to night, in accordance with a challenge which I gave three months ago at the last public meeting in London, in Oxford Hall, to this effect, that I should be prepared to meet the attorney-general or any of the six counsel most eminent at the bar, or any other advocate [362] cates that he might *put forward, and to satisfy any intelligent London audience that it was not consistent with the facts of this case, as I should present them to you, that he did not know throughout that trial that he was prosecuting that the claimant was Sir Roger Tichborne, and that he and the government afterwards, at his advice, do now at this moment know, or that they have the means of knowing, that it is so; that in sustentation of their conspiracy for the purpose of retaining these large estates in the hands of the Arundel family, the leading family, as we know, in a certain influential circle of society, for the purpose of retaining these estates in that family, and sustaining the whole course of their conduct from first to last, that they do know, or, as I say, have the means readily of knowing, that they are attempting to prosecute to conviction, to penal servitude, or again to Newgate, a man whom they know to be innocent of the charge brought against him."

Mr. Onslow afterwards made a long speech at the same meeting, of which the drift was to urge the audience to make subscriptions for the defense, and in the result Mr. Whalley moved a resolution: "That this meeting declares its opinion, in common with the country at large, that the prosecution of the claimant at the public cost was uncalled for, and, in the absence of explanation, which had been refused, wholly unjustifiable, and demands public reprobation; and that the support and sympathy of the British public are justly due to the claimant. This resolution was carried."

Upon the reports of these speeches, verified by affidavit, *Hawkins*, Q.C. (with him *Bowen*) had on behalf of the crown moved

for and obtained the summonses herein. Both gentlemen now appeared in court accordingly.

Sir *J. B. Karlake*, Q.C. (with him *A. L. Smith*) on behalf of Mr. Onslow, read an affidavit filed by him, in which he stated, among other things, that for many years of his life he lived on terms of intimacy and friendship with the late Sir James Tichborne and Lady Tichborne, his wife, and upon the death of the latter he attended the funeral at Tichborne Park. Sir James Tichborne and he were natives of the same county, and they saw a good deal of each other at different times. After the arrival of the claimant in this country in 1866, he became acquainted with him, and was in communication with Lady Tichborne on the subject of his identity, and he knew from her that she identified him as her firstborn son, the issue of her marriage with Sir James Tichborne, and as far as he could judge, he believed she had no doubt whatever on the subject. He was earnestly entreated by her ladyship before her death not to abandon or desert her son, the said claimant, and he faithfully promised that he would never do so, and, honestly believing, as he had always done and still did, that the person identified by her is her son, he had endeavored to the best of his ability and power during all the proceedings in the Court of Chancery and *in the Common Pleas, to assist him in establishing [363 his claim to the title and estates. It is a matter of notoriety, he said, that, ever since the claim was first made by the claimant to the present moment, his identity has been made the topic of conversation and discussion among all classes, in the house of commons, in the clubs, in society, and in almost every part of the kingdom: and finding that the result of the trial had had the not unnatural effect of creating a very strong prejudice against the claimant (the greater because many statements which had been made, but not proved by witnesses, were assumed to be true), he did attempt to counteract the feeling of prejudice, with the view and object, so far as he could attain them, of preventing the result of the trial from operating unjustly against the claimant in the criminal proceedings taken against him. After the release of the claimant from prison (Lady Tichborne, from whom during her life he received 1000*l.* a year since his return, having died) the claimant was wholly without funds to meet the expenses of his defense. He attended meetings in parts of the country with the object of obtaining funds for the purpose of defraying the expenses of his trial. The meetings of the 11th of December and the 12th of December, 1872, mentioned in the affidavits filed upon obtaining the rule in this case, were meetings called for such purpose as aforesaid. In the observations which he made, his desire, intention, and object were

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to counteract the feeling of prejudice existing against the claimant, so that he might, if possible, go into court to meet his trial for the criminal offense alleged against him unprejudiced by the result of the trial at *Nisi Prius*, and the comments which had been made upon him in the course thereof. He said that although now it was obvious to him that such observations, made with the sole object and purpose aforesaid, might be considered to have the effect of reflecting upon the character of witnesses and the conduct of the prosecution, it did not occur to him that such was or might be the effect. He had not the slightest intention of prejudicing or interfering with or preventing the course of justice, and it was with great regret that he had taken a course unwittingly which could be looked upon as indicative of having ever entertained any such intention. The affidavit thus concluded: "I repeat that at the time I made the observations complained of I had no intention whatever of interfering with the course of justice in the trials which are now pending. I made such observations under the circumstances and with the objects only above stated by me. As soon as I read the report in the public papers, of the motion to this honorable court, I saw that I had been betrayed into taking a course which laid me open to the imputation of having, in trying to remove prejudice operating against the claimant, created prejudice against the prosecution, and thereby, pending a trial, improperly commented upon matters connected with it; and I desire to express my unfeigned regret at having taken such a [364] course, and to apologize in all sincerity to this *honorable court for the conduct for which I am arraigned." So far as the counsel had been able to look into the subject, he found, he said, that where a matter was actually pending in a court it had always been deemed improper to comment upon the evidence which was or would be given on the hearing; and that if the effect of the comments were or might be to reflect upon the administration of justice, or to prejudice the fair trial of the case, then there was technically a contempt of court. In the present case the proceedings, no doubt, were so far pending that indictments had been found against the claimant which were standing for trial in this court; and so far as he could form an opinion from the authorities (though there was no express authority precisely in point), it might be considered that the proceedings were pending. If, however, he should be wrong in that view, and if in point of law the case was not pending, he hoped his admission would not prejudice the case of Mr. Onslow. The course he proposed to adopt, and which had been suggested to him by Mr. Onslow rather than suggested by himself to his client, was to explain the circumstances under which

that gentleman came to use the words complained of, and this he had done in his affidavit. He desired to urge that from the course the trial of the action had taken, it had come to a close before the evidence had been fully gone into, and many things had been stated by the attorney-general which, it was believed by his client, would not have been capable of proof, and Mr. Onslow had made his comments under the impression that the case, had it been concluded regularly, would have turned out very differently. No doubt, however, in the course of Mr. Onslow's speech, allusions were made to the coming trial, and he felt bound to admit that there were observations made which technically amounted to a contempt, inasmuch as they might tend to prejudice the fair trial of the case. Therefore they would come within the rule he had adverted to, assuming that the court would be of opinion that the case was pending. [COCKBURN, C. J. On that point we entertain no doubt.] That being so, of course the case would come within the principle of several recent decisions in the Court of Chancery on this very case, with reference to observations in the press. And he expressed on the part of Mr. Onslow his regret that he should have been betrayed into these observations. [COCKBURN, C. J. There is a question, Sir John, which I think it proper to put, and which is important. Are we to understand that Mr. Onslow in expressing that regret, which has been so happily expressed by you on his behalf, intimates to the court his clear intention and resolution not again to take part in any such proceeding?] Most undoubtedly; and he made that statement at Mr. Onslow's direction.

Digby Seymour, Q.C. (with him *Morgan Lloyd* and *Macrae Moir*), on behalf of Mr. Whalley, read an affidavit, in which that gentleman entered at great length into the facts of the ejectment. The affidavit concluded as follows: "And I further say that I attended *the said meetings with the sincere and honest [365 conviction that the same were lawful public meetings, convened for a legitimate object, and that I had a full right to discuss the matters contained in the speeches delivered by me at such meetings. It never occurred to me that anything said at the said meetings would unduly influence the jury that might be empanelled to try the said indictments, nor in any other way prevent a fair and impartial trial." The counsel observed that he was not aware of the course which was to be taken by Sir J. Karlake, who had acted without any communication or concert with him; and while he fully concurred with him in the language he had employed, he felt it his duty to point out to the court that there was this distinction between the present case and any other, that here the parties were commenting upon a

former trial which was concluded. [COCKBURN, C. J. But with attacks upon the conduct and character of witnesses who were to be called again as witnesses.] [LUSH, J. He suggests that what they had done once they would be likely to do again.] Mr. Whalley states that his only object was to promote an appeal on behalf of the defense. [COCKBURN, C. J. But if the obvious effect was to prejudice the fair trial of the prosecution, the purpose would not be material.] It might be material in a case of mere constructive contempt such as this. In all the other cases there had been attacks upon particular witnesses in a trial or hearing still pending. [COCKBURN, C. J. So there are here, for particular persons who are expected to be called as witnesses are charged with perjury.] This was explained as having reference to the former trial. [COCKBURN, C. J. The question of identity being the same in the civil as in the criminal trial, those witnesses who gave their evidence in the former trial, against the claimant would be called again in the ensuing trial to give their evidence against him. If the meeting had been convened only for the purpose of providing funds for the approaching trial, perhaps that might not in itself have been reprehensible. But if, speaking with reference to the approaching trial, those witnesses who it is known will be called to give evidence are denounced as conspirators, and as intending to give perjured evidence, is it to be doubted that this is a contempt? Is not this the test? Suppose a person afterwards called as a juror on the coming trial had been present at the meeting and heard these persons charged as perjured conspirators, would it not have been calculated to prejudice his mind?] If Mr. Whalley used language tantamount to that he could not of course vindicate it; but he denied that he had any idea of his language having such an effect. He was stating his reasons why persons should subscribe to the defense. That takes it out of the charge as to contempt. [BLACKBURN, J. That is quite contrary to the law, as I have always understood it.] In all the previous cases on the subject there had been attacks upon witnesses for their evidence on the very proceedings then pending; for instance, in the Chancery cases there had been attacks 366] upon *persons who had made affidavits in the case being heard. Surely there is a broad distinction between those cases and the present? [MELLOR, J. Even if there had been no direct allusion to the coming trial, can any man doubt that the statement that the witnesses in the former trial were in a conspiracy to deprive a man of his estates by means of perjury, would have had an effect upon the public mind as to the coming trial, in which, of necessity, the question would be the same and the witnesses must be the same?] Mr. Whalley had a lawful

object in view, in the course of urging which he had fallen into the use of this language. His object was only to promote subscriptions for the defense. [BLACKBURN, J. I have no doubt in all the cases of newspaper contempts which have occurred, the object was not to do injustice, but to promote the sale of the paper; but has that ever been considered an excuse?] [LUSH, J. Can any motive excuse the assertion at a public meeting that the witnesses on a coming trial are in a conspiracy to commit fraud by means of perjury?] He commented upon the evidence they gave at the former trial in order to show that they were combined together to defeat the claimant. [LUSH, J. With a view to show that they were likely to give false evidence on the coming trial.] Not necessarily so. They might or might not be called at the next trial. These remarks might be the subject of a criminal information. [BLACKBURN, J. But even if so, it is no reason why a party should not be prosecuted for a contempt.] It might be a reason why the court should not interfere summarily for a contempt that there was a remedy by way of criminal information. [MELLOR, J. If Mr. Whalley had confined himself to pointing out the great odds against the claimant, arising from the wealth and social position of the family opposed to him, and had urged all this as a reason for assisting him with subscriptions, avoiding calumnious imputations upon those who were against him, his case would have been very different, and I should have felt very reluctant to visit him with any penalty. But he has not been content with this, and has imputed to the witnesses against him that they were in a conspiracy to defeat and convict an innocent man by means of perjury.] His object, however, was legitimate. [COCKBURN, C.J. The motive or the object could not excuse a contempt of court.] [BLACKBURN, J. Unduly to interfere with a fair trial is not the less a contempt because it is done to get subscriptions for one side.] This is a "constructive contempt," and is, therefore, to be regarded with some jealousy. [BLACKBURN, J. Where is the distinction between an actual contempt and a "constructive" contempt?] The distinction is very obvious: one is a direct attack upon the court, and the other is only an indirect attack upon some of the parties or witnesses. [BLACKBURN, J. Lord Cottenham said in Mr. Lechmere Charlton's case (2 Myl. & Cr. 316, 342), "It is immaterial what means are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course. It [367 is a contempt of the highest order."] That was a very different case from the present. But even adopting that definition here, that was not Mr. Whalley's object. This was a constructive contempt and a novel case, and would carry the doctrine of con-

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tempt further than any case which has yet occurred. Mr. Whalley disclaimed any intention to pervert the course of justice, or interfere with a fair trial; and if he had been guilty of a contempt, it had been unwittingly, and in the conscientious discharge of what he believed to be a public duty. He apologized to the court, and promised not to attend any such meetings in future.

Hawkins, Q.C. (with him *Bowen*), appeared for the prosecution, and read extracts of the speeches made at the public meetings. He left the matter in the hands of the court.

COCKBURN, C.J., addressed Mr. Guildford Onslow and Mr. Whalley. I have to express the unanimous opinion of the court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) that in the proceedings set forth in these affidavits to which you have been called upon to give an answer you have been guilty of a gross and aggravated contempt of the authority of the court. We are far from saying that when persons believe that a man who is under a prosecution on a criminal charge is innocent, they may not legitimately unite for the purpose of providing him with the means of making an effectual defense; and any expressions intended only as an appeal to others to unite in that object, though, perhaps, not strictly regular, would not be fit matter for complaint and punishment. We quite agree that it would be harsh and unnecessary to interfere with the expression of opinion honestly entertained, and expressed only for a legitimate purpose. But it is no excuse to urge when—at a meeting held for the purpose of providing funds—language is used which amounts to an offense against the law—and a contempt against the court—that the motive or the purpose for which the meeting was held was justifiable. And when we find that at a former trial the jury before whom the claimant gave his evidence declared that they disbelieved that evidence, and that the learned judge who presided at the trial directed his prosecution, and that a grand jury—the proper and constitutional tribunal—have found true bills against him on the serious charges of forgery and perjury—that such a man should be paraded through the country and exhibited as a sort of show at public assemblies as the victim of injustice and oppression, and that at these meetings—in violent and inflammatory language—witnesses who had given evidence against him on the former trial should be held up to public odium as having been guilty of conspiracy and perjury; that the counsel engaged against him, and even the judge who presided at the trial, should be reviled in terms of opprobrium and contumely; and, what is still more immediately to the present purpose, that the events of the pending prosecution should be discussed, and the evidence assumed

to be false; and that all this should occur, not merely in the provinces, but in *the metropolis, almost in the precincts [368 of the court, and within the very district from which the persons are to come who are to pass in judgment between the crown and the accused in the coming trial—how can we shut our eyes to the fact that there is here an outrage upon public decency and a great public scandal, and that the even and ordinary course of justice has here been unwarrantably interfered with? This court, therefore, cannot, under such circumstances, hesitate to exercise the authority which it undoubtedly possesses, for preventing the public discussion of any trial pending in the court. It has been attempted to be contended on your behalf that the meetings in question were convened solely for the purpose of obtaining money, in order to enable the accused to carry on his defense, and with the additional purpose of removing any prejudice which the result of the former trial may have produced against him. But that can be no excuse if the language used amounts to an unwarrantable interference with the course of justice. And when we find that gentlemen of your station and position, gentlemen of education, members of the legislature, have condescended to lend themselves to proceedings of this character, and to hold such language as you have used on these occasions, we can only contemplate your conduct with astonishment and regret. When it is said that all this was done without any consciousness that it was an offense against the public justice of this court, though it must have the effect of creating prejudice with reference to the approaching trial, I can only accept that apology as really derogatory to the understanding of those who make it. There cannot be the slightest doubt in the mind of any sensible man that such a course of proceeding must interfere with public justice. It is open to those who take the part of the accused to discuss in public the merits of the prosecution in his interest; then it must be equally open to those who believe in his guilt to take a similar course on the other side. And then we may have, on the occasion of a political trial, or any case exciting great public interest, an organized system of public meetings throughout the country, at which the merits or the demerits of the accused may be discussed and canvassed on the one side and the other, and thus, by appeals such as you have not hesitated to make to public feeling in this case, the course of public justice may be interfered with and disturbed. It is clear that such comment upon a proceeding still pending is an offense against the administration of justice and a high contempt of the authority of this court. Nor can it make any difference in point of principle whether the observations are made in writing or in speeches at public meetings, and we can

have no hesitation in applying to the one case the same rule as to the other. We think, therefore, that the counsel for the crown have done no more than discharge their duty in bringing this case under our notice; and we must deal with it in such a way as to repress, if possible, such improper proceedings in future. 369] We are glad to find that on this occasion, *though attempts have been made to distinguish this case from others in which the court has interfered in the exercise of its summary authority, yet both parties have, through their counsel, submitted themselves to the court, and have given a clear and distinct pledge that they will take no part in such objectionable proceedings again. If there had been any hesitation in giving such a pledge, or the slightest appearance of it, and if there had not been the most submissive attitude assumed, the court would have thought it necessary to use to the full extent the power and authority it possesses, and would have inflicted a substantial fine and also a sentence of imprisonment in addition. We are happily spared the necessity of taking the latter course in consequence of the very proper line you have both of you adopted. But we wish it to be understood that in the fine we are about to impose we have gone to the extreme of moderation, and that if on any future occasion proceedings of this kind shall be resorted to, the full power of the court, which it immediately possesses to restrain and prevent such proceedings by the infliction of adequate punishment, will be certainly inflicted with a stern and unhesitating hand. The mischief in the present case, so far as the positive effect of these proceedings is concerned, has been very trifling indeed, thanks to the good sense of the metropolitan press in forbearing from giving publicity to these offensive and objectionable proceedings. But your intention was not the less reprehensible, nor your conduct the less open to severe censure. However, under all the circumstances we think that, considering the position you have taken and the pledge you have given, a pecuniary penalty of moderate amount — moderate with reference to the circumstances of the case and the aggravated character of the offense you have committed — will satisfy the exigencies of the case. But that leniency which we now exercise will be appealed to in vain if any other person shall be found guilty of a similar offense. The sentence of the court upon you is that for this contempt you do each pay a fine of 100*l.* to the queen, and that you be imprisoned until the fine be paid.

Upon consulting the other judges, the lord chief justice almost immediately added :

To persons of your position it is not necessary to apply the latter part of this sentence. The sentence of the court, therefore, is that you do each pay a fine of 100*l.* to the queen.

Jan. 21. COCKBURN, C. J. to-day made the following remarks with regard to this matter : I find that an impression has gone forth that, in remitting that part of the sentence pronounced yesterday which imposed imprisonment until the fine was paid, I was influenced by the anticipation of some difficulty as to the imprisonment of members of parliament by reason of some privilege which members of parliament possess. This is an entire mistake, imprisonment being only imposed as a means of insuring payment of the fine. I was reminded by my brother Blackburn that payment might be enforced without having recourse to *imprisonment, and it at once occurred to me [370 that it was unnecessary — looking to the position of these gentlemen — that imprisonment should be imposed until the fine was paid, especially as there were other means of enforcing payment. On that ground alone, that part of the judgment was recalled. I had intended to intimate in the judgment which, with the concurrence of the court, I pronounced, that if in the case itself there had not been a perfect submission to the court on the part of the defendants, and the clearest and most positive pledge that there would be no renewal of the conduct complained of, the sentence of imprisonment would have been added to the pecuniary penalty. The possibility of any collision with the house of commons had not appeared to us as ever likely to occur, especially as in the case of Mr. Lechmere Charlton, who was committed by order of the Court of Chancery, the house of commons declined to interfere on behalf of the privilege of their members ; and I am sure that the house of commons would not desire to interpose the privilege of its members to prevent punishment by imprisonment for a contempt in the administration of justice. I was anxious that there should be no misunderstanding on a matter of such importance as this, and, therefore, I have thought it necessary to correct an impression which seems to have prevailed as to the grounds on which we proceed in remitting that part of our judgment to which we have referred.

Attorney for the prosecution, the solicitor to the treasury.

Attorney for Mr. Onslow, *E. Bromley.*

Attorney for Mr. Whalley, *F. Moojen.*

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COURT OF QUEEN'S BENCH.

Wednesday, Jan., 29, 1878.

[12 Cox's Criminal Cases, 871.]

(Before BLACKBURN, MELLOR, LUSH, and QUAIN, JJ.)

REG. v. SKIPWORTH. REG. v. DE CASTRO.

Contempt.

It is a contempt of court, while a criminal charge is pending, to impugn the honesty and impartiality of the judge by whom it is to be tried, or to attempt to obstruct the course of justice by exciting public prejudice against it.

But it is not a contempt merely to solicit subscriptions for the defense of a defendant on a criminal charge.

THIS was a motion for the committal of the defendants for contempt of court. Defendant, De Castro, was the claimant of the Tichbourne estates in an action which, after a protracted hearing, terminated in a nonsuit, and the plaintiff was committed for trial upon a charge of perjury, which was appointed for trial at bar. In the meanwhile the defendant and his friends, of whom the other defendant Skipworth was one, had held meetings in various parts of the country, to excite sympathy for his cause and collect funds for his defense. After the hearing of the case against Onslow and Whalley (*ante*, p. 357), a meeting was held at Brighton, at which the defendants were present, Skipworth taking the chair, and speeches were made by them which were the subject of this complaint, taken in conjunction with other speeches previously made at other places.

On the application of counsel for the prosecution of De Castro, the court had made an order for the immediate attendance of the defendants and they appeared now in pursuance of such order.

The affidavits on which the charge of contempt was made were read at length. It will suffice to give the more important portions of them. The first read were the verbatim reports of the speeches of the defendants at the meeting at Brighton, which was the main subject of the complaint. The defendant Skipworth was reported to have spoken thus, *inter alia*: "Ladies and gentlemen, it is encouraging to find your reception after the degrading spectacle I may say I have witnessed at the 372] Queen's Bench to-day in London. ('Hear, *hear.') Nothing less than this — that two honorable members of parliament have been brought up, I may say as criminals, for advocating truth and justice throughout the country. ('Hear, hear,' and

applause.) Yes, gentlemen, I say a sad spectacle it is for England that we have come to this — no less than a great infringement upon our rights and liberties ('hear, hear'); and if they had a just cause upon the other side you may depend upon it it would never have been done. ('Hear, hear', and a cry of 'never.') And what do they mean when they rob a man of everything he possesses, while he has to go about the country for a living? They would even rob him of every friend he possesses. (Applause.) Gentlemen, I went into that court — I am a perfect stranger, no doubt, to you here — I live a long way off, and I would go a long way to advocate the cause of my friend Sir Roger Tichborne (applause) — I went, gentlemen, into that court to day, and I donned my wig and gown, that had lain up for above twenty years, in order to support the cause of my friend Sir Roger Tichborne. (Applause.) I live quietly on my estate in Lincolnshire — I have my home, I have my family and my affairs to attend to, but when duty to my country calls me forth, and when I see such degradation as I witness throughout the land — ('hear, hear') — yes, these honorable members of parliament have been brought up, have been treated as criminals, have had to apologize in the most degrading way, I may say, and have been fined for doing their duty to a fellow countryman. ('Hear, hear,' and applause.) Gentlemen, I was the chairman at that meeting in St. James's hall, where their conduct has been called in question. The lord chief justice of England particularly stated in his judgment how mild and moderate he was to these gentlemen, inasmuch as they had apologized in that way, but it was only an example, and that if any one else should similarly offend, or be brought up under similar circumstances, they would be visited with the full rigor of the law — not only a fine would be inflicted, but imprisonment. (Cries of 'shame,' and hisses.) Gentlemen, I hurl his intimidation back with the contempt that he has treated these members of parliament. (Loud applause.) I care not for his intimidation. I will, stand here when my duty calls me in defiance of his — ay, I will call them vulgar — threats. (Renewed applause.) I am not going to be intimidated when I consider that a duty to my country calls me forth. I have a conscience and that conscience I wish to satisfy. I could see very well there was no chance of any justice being done by these four judges from the first. It was like appealing to stone walls. I could see that their minds were all made up from the first, and that a conviction they were determined to make. (Hisses and applause.) And what is this but to prevent public free discussion in the country — what we have boasted of as hereditary, as it were, for centuries; and now we are to be put

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down above all things when truth and justice are advocated, 373] If it was something demoralizing to the *country that was to be put down there would be something in it; but you will I am sure answer that when you all assemble here together it is for a good purpose — you wish to know the truth of this great mystery that has been going on for so many years. (Applause.) Surely it has gone on long enough. Here these six or seven years has it been going on, and this gentleman has been up and down the country and still he is not acknowledged by his name and title. It is a disgrace to the country! And if they know, as I know, as well as I stand here and have known long ago, that he is Sir Roger Tichborne, how can they plead ignorance, those people who have had the affair in their own hands; they have had the affair in their own hands from the first, six or seven years ago. Why, they must be the most perfect idiots in the world if they don't know now and have done long since. (Applause.) Could a trial like that go on for all that time and all that talent employed — the judges, the counsel, and all concerned — and not know the real state of the case? And so these gentlemen, these two gentlemen, are to be brought up and sentenced to pay a fine and be threatened with imprisonment; they are to be stopped speaking, and the whole press of the country is allowed to be against Sir Roger Tichborne. (Hisses.) Why don't they take up his case if they wish to do justice? Why is he to be scurrilously treated, I may say, by hundreds of papers in this country? They almost seem to encourage it by their very silence. What are we to consider of the press of the country who will put down a fallen man, as it were, as they do — what are we to consider? Why, they must be hirelings of the government — nothing more or less. There are some exceptions, and I hope you have some of them here; for it is a very hard thing indeed to find an honest report of any of these meetings at all. I can only say that had I been the one charged to-day, I would have cut my hand off before I would have acknowledged I had been in error and humbly apologized where there was nothing to apologize for. (Cheers.) They should have sent me into a prison dungeon before I would have acknowledged anything that was untrue. I think the prison cells would be a paradise nearly to the polluted atmosphere in which we seem to live. For what is our country if we cannot boast of it as a country for right and justice? ('Hear, hear.') What is a man's property worth if he cannot secure it by proper right and title? I can only say that it comes to this: if this is Sir Roger Tichborne, as he undoubtedly is, it cannot be anything more than a conspiracy which keeps him out of his estates. But I consider that Lord Chief Justice Cockburn was

not a fit person to try anything in connection with the claims of the Tichborne estate. (A cry of 'Shame,' and hisses). I am sorry to say he has long since so prejudged that case, which disentitles him to sit as an impartial judge (hisses) when the title is concerned. (Renewed hissing and some applause). Yes, sir, you may hiss, but I hiss at the lord chief justice."

*The speech of the defendant, De Castro, was thus re- [374
ported :

"Four years ago the lord chief justice of England publicly denounced me as a rank impostor at his club. I know of others (occasions), but cannot prove them, so will not. But I can prove that he subsequently, within these last two months, at a party where a lady friend of mine was, distinctly turned round in a very angry manner to those ladies, and said it was a disgrace to mention my name in decent society. ('Oh, oh!') I think I have a right to call on him to answer for contempt of court. I do not suppose they would grant the rule, but rest assured I will apply for it. And I maintain, ladies and gentlemen, that he had no right to sit on that bench (to-day). At St. James's Hall my friend Mr. Onslow stated that the lord chief justice was not a fit justice to sit on my forthcoming trial. He gave as his reasons those I have mentioned, and that he had also, during the late trial, while sitting by the side of Judge Bovill, written on a piece of paper—'Had I been judge and you leading counsel we would have had this fellow in Newgate long ago.' He was a party concerned, and if he had had the slightest delicacy for his honor he would never have sat on the bench (to-day). So much have I heard that I intend to petition parliament against his sitting on my forthcoming trial. No doubt I shall be able to prevent him. If I do not I will go into that court without counsel, attorney, or witnesses, and let him crush me as he thinks proper.' ('No, no.') If the lord chief justice has got to sit and adjudicate on my case I will offer no evidence, but throw myself on the country." (Applause.)

De Castro filed no affidavit in answer.

Skipworth filed an affidavit from which the following is an extract: "The meetings complained of were given out to be called for the purpose of raising money for the Tichborne defense fund, but I did not attend them on that account alone, but for the purpose of enlisting sympathy in the case. At these meetings no improper language was used, except under excitement caused by hostile interruptions. The meetings took place, too, by reason of the enormous interest taken in the case throughout the country, and often upon invitation and at the express desire of respectable persons. And all these meetings were unanimous in declaring a belief in the claimant.

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"I have had no other object than to promote the cause of truth and justice. If I have made any improper statements—of which I am not aware—it has been through inadvertence, and not intentionally. The remarks I have made upon any of the judges or law officers of the crown were meant in the way of honest comment and fair criticism upon their public acts and conduct. I had not the slightest intention of bringing the court into contempt, but my sole object has been to uphold the interests of justice, which I believe to be in jeopardy."

Mr. Skipworth went on to say that he was in court, and heard the sentence passed on Mr. Onslow and Mr. Whalley; and he 375] *thought that under the circumstances there had been a degradation and dishonor to the law which he felt called upon to protest against. "The remarks I made" (he said) "at the Brighton meeting, as to the lord chief justice not being a proper judge to try the case, were based upon notorious and well-known facts, he having repeatedly denounced the claimant as an imposter;" and on this account, Mr. Skipworth said, "I considered it improper that he should preside." "I put it to the meeting, not in the spirit of aspersion or contempt, but as an observation fairly called for by the position of the case; and, though I was excited by a hiss to say 'I hiss the lord chief justice,' that expression escaped me on the spur of the moment; and, being sensible upon reflection that the expression was improper, I withdrew it. But I cannot forego my right to comment upon the conduct of a judge with reference to a case before him. With regard to the charge of attending this particular meeting, I must say that though I was not bound by the submission and the pledge given by the two members of parliament, I avow that I attended that meeting in defiance of the threat held out by the court, and that it was with the distinct intention of setting that threat at defiance; for I considered that such a threat ought not to have been uttered from the bench, and it was my object to prevent the stigma and reproach attaching to the country of our being a nation of cowards, and to show that there was at least one man who had a spark of public spirit in his breast sufficient to inspire him to resist the attempt made to extort pledges—which there was no legal right to exact—not to attend meetings admitted to be lawful." In conclusion, Mr. Skipworth submitted that he could not but consider the course now taken against him unjust, cruel, and oppressive.

After this various letters and publications of his on the subject were read. One was a letter to the queen, which, of course, had only a dry official acknowledgment from the under secretary, then a letter to Mr. Gladstone, and then one to the people of England. These documents commented in strong terms upon

the conduct of the civil trial, and on the course taken by the government in adopting the prosecution of the claimant. They contained some startling statements, as that during the trial the attorney-general was seen with his arm round Mr. Sergeant Ballantine's neck whispering in his ear—a statement which excited roars of laughter. Another statement was that Mr. Gladstone said to the attorney-general, "Whatever happens, mind we don't fail in the Tichborne case"—a statement which excited similar peals of laughter.

After these documents were read, Mr. Skipworth, being called upon for any further defense he had to offer, rose up and said: "My lords, if upon these statements you commit me for contempt of court, all I can say is that I throw myself upon my country and my God!" He then sat down.

De Castro was then called upon for his answer. He said: I am not aware that I have committed any contempt, and if I have *done so it was not my intention; but I submit [376 that the charge ought to be tried by a jury; before them I could prove what I have stated to be true.

BLACKBURN, J., intimated that in a proceeding for contempt the matter was tried by the court.

De Castro. Then, you decide that you are to try it yourselves?

BLACKBURN, J. Such is the course.

De Castro. But, you see, I am charged with contempt in complaining of the lord chief justice, and you are his colleagues. It is not fair that you should try it without a jury.

BLACKBURN, J. To use any argument upon that point would be without avail. It has long been settled that an attempt to interfere with the course of justice is a contempt of court. It is too late to dispute that.

De Castro. But am I to have no opportunity of proving that what I said was true?

BLACKBURN, J. You are not charged with a contempt in the sense of having insulted any member of the court, but with an attempt to obstruct the ordinary course of justice, and using undue influence to prejudice a trial.

De Castro. I have not used any undue influence to prejudice the coming trial; it was with reference to my late trial, and especially to the attacks of the attorney-general, from which I had a right to defend myself. Besides, great injustice has been done to me in every way. The government took up the prosecution, and their attorney-general had previously been counsel against me, and applied the strongest language to me, using such epithets as "conspirator," "perjurer," "forger" and "imposter." And at the trial, as the case was stopped, my counsel was not heard in reply, so I had a right to reply before the public. Besides,

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all the papers were against me, except the *Morning Advertiser*, and they were continually making attacks upon me. Your lordships will say, probably, that I could have brought them before the court, but without funds I had not the means of doing so, and the government had any amount of money at their disposal. Why, only last Saturday, while the matter was pending, there was an article in the *Saturday Review* heaping the foulest abuse upon me. Is that fair or just, my lords?

BLACKBURN, J. As you appeal to us, we are bound to answer you, and to say that we think it is not just, and that we entirely agree with you in thinking that it was a most improper article, for the very reason you are now brought before us to answer for what you have done, and we only hope no one will offend again.

De Castro. But what I want to urge upon you, my lords, is that, as these publications were coming out against me ever since I was committed for trial, I had a right to meet them in the only way I could—by going about the country and addressing public meetings in my defense.

He then went on to read articles in which he had been attacked, and urged that as his counsel had not been heard 377] *in reply, he had no other means of meeting these attacks than speaking at public meetings. Therefore it was, he said, that he had gone from town to town trying to meet and to answer these charges, and to appeal to his fellow-countrymen against the attacks of the press. He urged that he had a right to do so, and that the court had no right to interfere with him. He urged, again, that this was the more just because his trial had been put off for twelve months in order to enable the government, with all the aid of the government funds, to get up a stronger case against him by means of advertising for evidence and other methods in Australia. He urged, further, that these meetings had been going on for many months without being in any way objected to, and had lately been brought before the Court of Chancery without any objection. He urged, again, that when, in 1870, he brought the *Echo* before the Court of Chancery for prejudicing the case before the hearing and before the trial, the vice-chancellor let them off with payment of their costs, and he had to pay his own. After that, of course, he made no further attempt to obtain redress in court, and now he was charged with "contempt" of court because he tried to get redress by appealing to the public himself. He had attended eighteen of these meetings, and had held at all of them the same language, and had never been interfered with before in any way. He protested that he had only asserted the right of a free-born Englishman in defending himself; and he urged that had the

government done their duty and behaved fairly he would never have been driven to this. Finally, he appealed to the court, on the ground that if they sent him to prison or inflicted a fine which he could not pay they would prejudice his defense in the prosecution now pending against him, and deprive him of the means of making his defense.

Hawkins, Q.C., briefly addressed the court, observing that as to Mr. Skipworth he had desired only to place the matter before the court, and that as to the claimant he had not desired to take any step at all, and that he now left the matter entirely in the hands of the court.

BLACKBURN, J. (the court having consulted), said : these persons have been called upon to show cause why they should not be committed for contempt of court, and the first question is whether they have been guilty of a contempt. The word "contempt" has caused persons who are not lawyers to suppose that it means a proceeding to protect the personal dignity of the judges from insult to them as individuals, and sometimes, no doubt, persons have been committed for such personal attacks, although, so far as their protection as individuals is concerned, that is a subordinate object, and the cases are very rare in which the judges would consider it worth their while to interpose on that ground. But there is another and more important object for which it may be necessary to interpose. Any case which is pending, either in a civil or criminal court, ought to be tried in the ordinary course of justice, and in the present case [378 there is an indictment against one of the persons before us which is now standing for trial. That case ought to be fairly tried; but it may happen that proceedings occur such as have now called upon us to interfere. Sometimes the course taken has been by attacking the judge; sometimes by attempting to induce him to alter his opinion or to take a course different from that which he would otherwise take; more commonly, there is an attempt to influence the trial by attacking the witnesses or appealing to public feeling so as to prejudice the trial. In all these ways, great mischief may be done, interfering with the due and ordinary course of justice. When the attempt is by an act which is itself punishable, as conspiracy, libel, or assault, the party might, of course, be indicted for it; but the prosecution, though sufficient for the purpose of punishment, might be made greater for the purpose of prevention; the mischief might be done, and the administration of justice would be perverted or prejudiced. For that reason, from the earliest times, the superior courts of law and equity have exercised the jurisdiction of prosecuting such attempts by summary proceedings for contempt, and having that power, it is our duty, when the occasion

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arises, to exercise it. In the present instance, as Mr. Hawkins has stated, he did not desire to proceed against the defendant; but we thought that as there had been an attempt to interfere with the course of justice, it was our duty to interpose against him, and we, therefore, ourselves, ordered him to attend. And I am bound to say that he has defended himself here with great propriety, and, making allowance for the want of legal knowledge, he has taken every point in his favor which the ablest counsel could have done. Nevertheless, he has not succeeded in showing us that he has not been guilty of a contempt. He has urged that the matter ought to be tried by a jury, but the question is not now whether he is innocent or guilty on the indictment on which he will be fairly tried hereafter. The attempt to prejudice the trial is the offense with which he is now charged. We are not to inquire whether what he has stated be true or false, but whether the course he has taken be such as to show that he intended to influence the trial and prejudice the question by appeals to public feeling. All such attempts amount to contempt of court, and we hardly think it necessary to cite any authorities on the point. We need only mention one.

(The learned judge here cited the case of Mr. Charlton (2 Myl. & Cr.), where that gentleman, while his case was being heard before the master, wrote to him an insulting and threatening letter, for which Lord Cottenham committed him, saying, "The power of summary committal for contempt is given to the courts to secure the due administration of justice," and going on to show that the case was one which called for its exercise). Lord Cottenham, after citing authorities, said in that case, "All the authorities tend to the same conclusion; and wherever the object is to taint the course of justice and to obtain a result different from that which would *follow in the ordinary course, it is a contempt; and though such an attempt here has not had any effect, yet if such attempts as this were not punished, the most serious consequences would ensue." These words indicate the kind of contempt which has been attempted in the present instance, where there has been an attempt by means of vituperation to deter the lord chief justice from taking any part in the trial, and also by attacks upon the witnesses themselves, to influence the public mind and prejudice the jury. Mr. Skipworth has, in so many words, said that he intended to do so, and that he will do it again. Such a course, we are all of opinion, amounts to a contempt of court. We have then to consider whether it is the less so because it is foolish and ineffectual. It is true that it is utterly ineffectual. Before these meetings had been heard of it came to be a question whether

the case should be tried before a single judge or at bar — that is, before the full court, or several judges of it, when each judge takes part in the proceedings, and, possibly, as has actually happened, they may have different opinions and express them. That occurred in the trial of the seven bishops, and the judges expressed different opinions and gave conflicting directions to the jury, the result of which was an acquittal. Such is the nature of a trial at bar; and it is within my personal knowledge that before any application was made on the subject, the lord chief justice stated that he thought it right, as it was likely to be a case of much magnitude and importance, that more than one judge should sit to assist him in the trial. Afterwards the attorney-general, as was his privilege, prayed a trial at bar, and that was at once acceded to. It was, however, the personal desire of the lord chief justice that the case should not be tried by himself alone, but by the several judges at bar. That being so, we find that meetings are held at which the object appears to have been, by means of vituperation, to deter the lord chief justice from sitting at the trial. They will, however, have no such effect. There is not and never has been the slightest doubt in my mind, nor in the mind of any member of the court, that it would be a great dereliction of duty on the part of the lord chief justice, or at least a culpable weakness on his part, if he were to yield to this influence and refrain from sitting on the trial of the case. There is not, however, the slightest idea of doing so. The lord chief justice is of opinion that it is his duty to sit on the trial, and we are all of the same opinion. In the course of these proceedings various observations have been made reflecting upon him, or upon other persons, but principally as to what the lord chief justice is supposed to have said on various occasions on the subject; but it is not right that a judge in the high position of the lord chief justice should be exposed to such attacks and expected to come forward to deny, to explain, or to refute them. A judge in his position cannot be expected to come forward to vindicate himself from such imputations. As I am not to sit upon the trial, I may permit myself to say that I am sure it will be conducted with *perfect impartiality. These attacks, then, have failed in their object, but it is not the less incumbent upon us to visit them, for in future cases the influence exerted might be more formidable, and require the strongest measures to repress it. We may imagine the case of a popular person indicted for sedition or treason, and appealing to public sympathy and support. It might require considerable nerve to resist such attempts, and if we were to pass over the present instance, when the more formidable case arose, in which our successors might find themselves obliged to

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interpose, they might find themselves seriously embarrassed by the precedent we should have set. Besides, it would be a great public scandal if these proceedings were allowed, and it is essential that they should be stopped. That being the view we take of our duty upon this occasion, there can be no doubt that both these persons have attended public meetings with the intention of influencing the ordinary course of justice and prejudicing the trial, and we can come to no other conclusion than that they have been guilty of a contempt of court. The second question that arises is what should be their sentence. Here I would observe that under ordinary circumstances the lord chief justice would preside here, and his absence is not to be supposed as at all inconsistent with anything I have said. But we have to determine the amount of punishment for an offense which has partly consisted of personal attacks upon the lord chief justice; and where that is the case there is the risk that his feelings might be thought vindictive, and the still greater risk that his anxiety to avoid it might lead him to be too lenient, and, therefore, it was desirable that he should avoid this difficulty by being absent on the occasion. In a court of equity, where there is only a single judge, it would not be possible to avoid it; but here it is so, and therefore he has not thought fit to take any part in fixing the amount of punishment. But his absence is not to be supposed inconsistent with anything I have already said upon the subject, and his absence has not been caused by anything that has happened. Having said so much, we proceed to consider what should be the sentence in this case. And first, as to Mr. Skipworth, I cannot see anything in his favor. He has deliberately come forward, as he vows, to influence the trial of the case; he declares the claimant to be innocent, and tries to persuade the public that he is so. Up to last Monday week he might have supposed he was doing nothing wrong, but on that day he was present in court and heard Mr. Onslow and Mr. Whalley declared guilty of contempt. Having heard that judgment, he went down in Brighton and held a public meeting, at which he denounced the lord chief justice, and spoke in terms not very complimentary to the rest of the court. For such an aggravated offense we must impose a sentence of fine and also of imprisonment, and the first question is as to the amount of the fine, which must not be excessive, but still must be sufficient to be deterrent, and within those limits the amount is within our discretion. Upon the whole, 381] we think that the *amount ought to be 500*l*. To that we must add a term of imprisonment, and that also must be sufficient to prevent the mischief of interference with the trial which is to be held in April next. We think, therefore, that the term

of imprisonment must be three months. Then, as to the other defendant on the indictment: no doubt he has attempted to influence the course of justice, and, therefore, has been guilty of a contempt, but there are differences and mitigating circumstances in his case. One great difference is this, that he is a party in the case, to whom some latitude must be allowed; and, although we think he has gone beyond the limit, still it is a consideration to be borne in mind. Again, it is to be considered that he was assailed by attacks in the press calculated to prejudice his trial, and if he had confined himself to answering those attacks, though he might still have been guilty of a contempt, it would have been one of which this court might have been reluctant to take notice. There is another consideration to which he has very justly adverted, that we must take care in passing sentence upon him not to do anything that might prejudice him in his defense. Still, these proceedings must be stopped, though we do not desire to do anything that might prejudice him in his defense. If we were to impose a fine or inflict imprisonment it might have that effect, but it is necessary that these proceedings should be stopped. Taking these things into consideration, we are of opinion that the proper course would be that he should give security, himself for 500*l.* and another for 500*l.*, that he will be of good behavior and not be guilty of any contempt of court for the period of three months; otherwise he must be imprisoned until then.

MELLOR, J. I entirely concur in what my brother Blackburn has expressed upon the matter. I entertain no doubt whatever of the character of the contempt, or that it is one which it is our duty to repress: and I agree with the reasons he has given, and also in the distinction he has drawn between the cases of the two persons now charged before us.

LUSH, J. I am of the same opinion, and have nothing to add to the observations of my brother Blackburn.

QUAIN, J. I also entirely agree with my brother Blackburn.

BLACKBURN, J. Then, that being the judgment of the court, I must proceed to pass sentence accordingly. Mr. Skipworth, the sentence of the court upon you is that for this your contempt you be fined 500*l.*, and be imprisoned in Holloway jail for three months, and until the fine be paid; and for you, Tichborne, Castro, Orton, or whatever be your name, the sentence of the court upon you is that you find security and surety for 500*l.* to be of good behavior for three months, or else that you stand committed for three months.

Hawkins, Q.C., and Bowen, for the prosecution.

The defendants conducted their own cases.

COURT OF PROBATE.

January 21 and 23, 1873.

[12 Cox's Criminal Cases, 332.]

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*(Before Sir J. HANNEN.)

In the Goods of JEMIMA STEVENS (¹).*Administration — Deceased wife a felon convict — Legacy accruing after her death — Notice to Queen's Proctor.*

A married woman was convicted of felony and transported to Australia for seven years, where she was lost sight of, and nothing had been heard of her since 1843. In 1860 a legacy to which she was entitled under a will made in 1827 became payable, and the husband now moved for a grant of administration.

Held, that the grant could not be made until a notice had been given to the queen's proctor.

JAMES STRATTON, late of Holme Hall, in the county of Norfolk, a bachelor deceased, died 9th of September, 1827, leaving a will duly executed, which was proved in the court at Norfolk in the same year. By it the testator devised a small copyhold estate at Little Tranham, in the county of Norfolk, to his brother John Stratton for life, with remainder to another brother for life, and after his death to Mary Chapman, wife of William Chapman, or her heirs absolutely, subject to the payment of 100*l.* to Jemima Stevens, of Durham Market, in the county of Norfolk. Robert Stratton was the survivor of the three persons named, and died in 1869. Jemima Stevens, whose legacy then became payable, was convicted of felony, and in June, 1833, she was transported to Tasmania for the term of seven years. In 1843, she received a certificate of freedom, and no further intelligence had since been received of her.

C. A. Middleton now moved for a grant of administration to the estate and effects of his wife, save and except any separate property to which she might have become entitled, or which she might have acquired during her sentence. The death of the wife may be presumed, and the legacy being the property of the husband, a chose in action though not reduced into possession, the crown can have no claim to it. The wife had no separate estate, otherwise the crown would have confiscated it. 383] If the *husband had been convicted and not the wife, then the crown would have been entitled. There is no authority precisely in point; but for the converse case of a wife acquiring separate estate during the conviction of her husband, see *Coombs v. Queen's Proctor* (2 Rob. 547), and *Re Harrington's Trusts* (29 Beav. 24). *Cur. adv. vult.*

(¹) Reported by W. LEYCESTER, Esq., barrister at-law.

Jan. 28.—Sir J. HANNEN. I have considered the case, and I have come to the conclusion that you must give notice to the queen's proctor before any grant can go. If he declines to interfere on behalf of the crown, then you may take a grant as prayed.

Solicitors, *Whites, Renard, and Co.*

NORFOLK CIRCUIT.

NORTHAMPTON SPRING ASSIZES, 1873.

(Before MARTIN, B.)

[12 Cox's Criminal Cases, 390

*REG. V. WATERS.

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Breaking prison — Arrest without warrant — Remand dismissal.

W. was given into custody without a warrant on a charge of felony. He was conveyed before a magistrate, who remanded him in custody without any evidence on oath. W. was removed to a lock-up from which he escaped. The charge of felony made against him was dismissed by the magistrates.

Held (per Martin, B.), that the dismissal by the magistrates was not equivalent to an acquittal by a jury, that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand, and that these facts were no defense to the indictment for breaking prison.

THE prisoner was indicted for breaking out from the lock-up at Wellingborough, being then in lawful custody for felony.

Monckton for the prosecution.

Graham for the prisoner.

It appeared that the prisoner and another man had been given into the custody of a police officer, without warrant, on a charge of stealing a watch from the person. They were taken before a magistrate. No evidence was taken upon oath, but the prisoner was remanded for three days. The prisoner broke out of the lock-up and returned to his home. He appeared before the justices on the day to which the hearing of the charge had been adjourned, and on the investigation of the case it was dismissed by the justices, who stated that in their opinion it was a lark, and no jury would convict. The above facts having been proved.

Graham, for the prisoner, submitted there was no case, as the prisoner was not lawfully in custody, since the magistrate had no power to remand him and detain him in custody without evidence on oath.

MARTIN, B. On referring to Jervis's Act (11 & 12 Vict. c. 42, s. 21), held that the justices had such power.

Graham contended, secondly, that the charge having been dismissed by the justices, the prisoner could not be convicted of

(¹) Reported by J. W. COOPER, Esq., barrister-at-law.

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391] *breach of prison, citing Lord Hale, i. 610, 611, that if a man be subsequently indicted for the original offense and acquitted such acquittal would be a sufficient defense to an indictment for breach of prison.

MARTIN, B., held that a dismissal by magistrates was not tantamount to an acquittal upon an indictment. It simply amounted to this, that the justices did not think it advisable to proceed with the charge, but it was still open to them to hear a fresh charge against him.

Verdict — Guilty. Sentence — Six weeks' imprisonment.

NORFOLK CIRCUIT.

BEDFORD SPRING ASSIZES, 1873.

(Before MARTIN, B.)

[12 Cox's Criminal Cases, 391.]

REG. V. ASPLIN (¹).

False entry in a marriage register.

Upon an indictment under 24 & 25 Vict. c. 98, s. 37, for making a false entry in a marriage register, it is not necessary that the entry should be made with intent to defraud, and it is no defense that the marriage solemnized was null and void, being bigamous. If a person knowing his name to be A signs another name without authority, he is guilty, and it is immaterial that he is a third witness, the Marriage Act only requiring two.

WILLIAM JOHN WARD ASPLIN was indicted under 24 & 25 Vict. c. 98, s. 37, for feloniously inserting in the register of marriages authorized and required to be kept for the parish of Stondon a certain false entry relating to the marriage of a man representing himself to be James Richardson to Sarah Ann Kinlock on the 3d of June, 1872.

Graham for the prosecution.

O'Malley, Q.C., and *Naylor* for the prisoner.

The facts of the case were shortly as follows. A person by the name of Wilcocks was engaged to be married to Sarah Ann Kinlock, but he being a married man had assumed the name of 392] *Richardson. The friends of Miss Kinlock, knowing little or nothing of Richardson, had insisted that some member of Richardson's family should be present at the marriage. Richardson made the acquaintance of the prisoner in a casual manner in a train on the Great Northern Railway, and invited him as a guest to the wedding. On the prisoner's arrival on the morning the marriage was to be solemnized Richardson told the prisoner

(¹) Reported by J. W. COOPER, Esq., barrister-at-law.

that his brother had failed to be present, and asked him to personate him. This the prisoner, after some reluctance, agreed to, and after the ceremony was concluded signed his name in the parish register of marriages as "Geo. Richardson," there being also two other witnesses. Before the bride and bridegroom left the prisoner admitted the deception he had practiced, and the marriage was never consummated. Richardson alias Wilcocks was indicted for bigamy and convicted at the Old Bailey.

O'Malley, Q.C., on these facts being proved, submitted that there was no case, as it had not been proved that the entry was fraudulent, and that there was no entry of a legal marriage, it being bigamous; therefore, it was not a false entry relating to a marriage within the meaning of the act; further, that only two witnesses being necessary the entry by the prisoner was mere surplussage and not material.

MARTIN, B., overruled all these objections, and told the jury that the sole question was whether the prisoner, well knowing his name was Asplin, had signed his name George Richardson; if so, he was guilty. He refused to reserve any of the points for the Court of Criminal Appeal.

The jury convicted the prisoner, and he was sentenced to a month's imprisonment.

MIDLAND CIRCUIT.

WORCESTER SPRING ASSIZES.

March 3d, 1873.

(Before QUAIN, J.)

[12 Cox's Criminal Cases, 393.]

*REG. v. ELIZABETH BANKS AND LEAH BANKS (1). [393]

Conspiracy to murder unborn infant — Evidence of conspiracy continuing after birth of infant — Proposing to murder infant expected to be born — 24 & 25 Vict. c. 100, s. 4 — Effect of Letter proposing to murder written before birth of infant, but posted so as to arrive at destination subsequent to birth — Effect of intercepted letters.

An indictment alleging a conspiracy to murder a living infant will not be supported by evidence of a conspiracy existing previous to the birth of such infant unless the agreement and intention continue subsequently to the birth.

A design by two persons, by different means, to murder a child of which a woman is pregnant, and expects soon to be delivered, is sufficiently proximate to be the subject of a conspiracy.

A wrote and put in the post office at H., at four o'clock one afternoon, a letter addressed to B, at W, containing a suggestion for the murder of a child to which B was expecting to give birth. The child was born at one A. M. on the follow

(1) Reported by W. H. CLAY, Esq., barrister-at-law.

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ing morning. The letter posted at H. would have been in the ordinary course, and was in fact delivered at the house where B lodged at eight o'clock on the morning of the day after it was posted at H. The letter never came to B's hands, being intercepted by the landlady of the house:

Held, on these facts, that the jury might find that the act of A continued until the letter was delivered at the house of B; and if the letter had reached B, that A might properly have been convicted of soliciting and inciting B to murder her child, and, the letter having been intercepted, that A could be convicted of an attempt to solicit and incite B to murder her child.

Indictment.

City of Worcester, and county } The jurors for our lady the
of the same city, to wit } queen, upon their oath, present
that Elizabeth Banks and Leah Banks, on the 15th day of October, in the year of our Lord one thousand eight hundred and 394] *seventy-two, unlawfully and wickedly did conspire, confederate, and agree together a certain infant female child of tender age, to wit, of the age of two days, the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of their malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

Second Count. And the jurors aforesaid, upon their oath aforesaid, do further present, that on the 11th day of October, in the year of our Lord 1872, the said Elizabeth Banks was delivered of a female child, the name whereof is to the jurors aforesaid unknown, which said child was then and still is living, and that the said Elizabeth Banks, and the said Leah Banks, did unlawfully and wickedly conspire, confederate, and agree together the said child feloniously, wilfully, and of their malice aforethought to kill and murder against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

Third Count. And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid the said Elizabeth Banks was delivered of a female child, which said child then was and still is alive, and the name whereof is to the jurors aforesaid unknown, and that before the said child was born, and whilst the said Elizabeth Banks carried and was quick with the said child of which she was so delivered as aforesaid, to wit, on the 9th day of October, in the year aforesaid, the said Elizabeth Banks, and the said Leah Banks, being evil disposed persons, and wickedly devising and intending, if and in case the said child was born alive, the life of the said child to take and destroy, unlawfully and wickedly did conspire, confederate, and agree together the said child if born alive, feloniously, wilfully, and of their malice aforethought, to kill and murder. And the jurors aforesaid, upon their oath aforesaid,

do further present that afterwards, to wit, on the 10th day of October, in the year aforesaid, and in pursuance of and according to the same conspiracy, confederation, and agreement, the said Leah Banks did write and post at a certain post office a letter to the said Elizabeth Banks, with intent the same should be delivered to and read by the said Elizabeth Banks, and in and by the said letter did incite, encourage, and propose to the said Elizabeth Banks the life of the said child to take and destroy. And the jurors aforesaid, upon their oath aforesaid, do further present that after and in pursuance of and according to the said conspiracy, confederacy, and agreement, to wit, on the 13th day of October, in the year aforesaid, the said Elizabeth Banks did write a letter to the said Leah Banks, and did deliver the said letter to one Jane Mables, with intent the said Jane Mables, should post the same, and that the same should be delivered to and read by the said Leah Banks, and in and by the said letter did solicit and propose to the said Leah Banks to aid and assist her, the said Elizabeth Banks the life of the said [395] child to take and destroy, against the peace of our lady the queen, her crown and dignity.

Fourth Count. And the jurors aforesaid, upon their oath aforesaid, do further present that on the 11th day of October, in the year of our Lord 1872, the said Leah Banks unlawfully and wickedly did solicit, encourage, persuade, and endeavor to persuade the said Elizabeth Banks a certain female child then lately before born of the body of the said Elizabeth Banks, the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

Fifth Count. And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid the said Leah Banks unlawfully and wickedly did propose to the said Elizabeth Banks a certain female child then lately before born of the body of the said Elizabeth Banks, and the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

Sixth Count. And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid, the said Elizabeth Banks was delivered of a certain female child, which said child was then and still is living, the name whereof is to the jurors aforesaid unknown, and that before the birth of the said child, and whilst the said Elizabeth Banks carried and was quick with the said child, to wit on the 10th day of October,

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in the year aforesaid, the said Leah Banks falsely, wickedly and unlawfully did solicit and incite the said Elizabeth Banks, the said child when born by means of a certain poison, to wit, salts of lemon, feloniously, wilfully, and of her malice aforethought to kill and murder, to the evil example of all others in like case offending, and against the peace of our lady the queen, her crown and dignity.

Seventh Count. And the jurors aforesaid, upon their oath aforesaid, do further present that on the 11th day of October, in the year of our Lord 1872, the said Elizabeth Banks was delivered of a female child, then and still alive, the name whereof is to the jurors aforesaid unknown, and being so delivered of the said child as aforesaid afterwards, to wit, on the 15th day of October, in the year aforesaid, unlawfully and wickedly did solicit, encourage, persuade, and endeavor to persuade the said Leah Banks the said child feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

Eighth Count. And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid the said Elizabeth Banks unlawfully and wickedly did propose 396] *to the said Leah Banks a certain female child then recently born of the body of the said Elizabeth Banks, the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

Ninth Count. And the jurors aforesaid, upon their oath aforesaid, do further present that on the said 11th day of October, in the year aforesaid, the said Elizabeth Banks was delivered of a female child, then and now living, the name whereof is to the jurors aforesaid unknown, and afterwards, to wit, on the fifteenth day of October in the year aforesaid, falsely, wickedly, and unlawfully did solicit and incite the said Leah Banks her the said Elizabeth Banks to aid and abet in taking and destroying the life of the said child by drowning, and so the said child feloniously, wickedly, and of her malice aforethought to kill and murder, to the evil example of all others in the like case offending, and against the peace of our lady the queen, her crown and dignity.

T. F. Streeten for prosecution.

Jelf for prisoners.

The prisoner Elizabeth Banks, aged eighteen, having been seduced, and being pregnant with an illegitimate child, came to Worcester in August, 1872, and took a lodging at the house

of one Martha Mables. About one A. M. on the morning of Thursday, the 11th of October, she was confined, and a child was born alive, and was living up to the time of the trial. The prisoner Leah Banks, although really the aunt of Elizabeth, was only a few months older than her niece, and Leah and Elizabeth had lived together from childhood in the house of Leah's mother, at Hartpury, near Gloucester. About half-past three on the afternoon of Wednesday, the 10th of October, the prisoner Leah came to the post-office at Hartpury, and gave to the postmistress a letter addressed to the prisoner Elizabeth. The letter was in due course forwarded to Worcester by the mail, leaving Hartpury soon after four o'clock, and was delivered at the house of Mrs. Mables, in Worcester, on the following morning, a few hours after the birth of the child. Mrs. Mables, into whose hands the letter came, did not deliver it to the prisoner Elizabeth, and in fact it never reached her hands, nor was communicated to her. The letter contained the following passage: "I think the best thing for you to do is to get about two or three pennyworth of salts of lemon, as that will be easier got than anything else, and as soon as you can get to feed your baby yourself, put a very little in its food at a time; mind no one else do not have any of it, but give it very little at a time, as it is a strong poison, and the child will gradually waste, and in a few days it will be dead; and, of course, no doctor nor anything of the kind will be wanted, but it will be took in the night and put in the cemetery, and no one will have no suspicion. Burn the paper you buy it in as soon as *you get it home, and [397 put it in some plain white, as there will be a label upon it. Tell them at the druggist's you want it to take stains out of clothea." On Sunday, the 14th of October, the prisoner Elizabeth wrote, and gave to a girl in the house, a letter, which she requested might be posted. The letter was handed to Mrs. Mables, who did not post it, but delivered it with the letter mentioned above to the chief constable at Worcester. The letter written by Elizabeth was addressed to the prisoner Leah, and contained the following passage: "Tell me if I cannot come home on Saturday I have been thinking I will not come until Saturday night, then, if I am obliged to bring it" (*i. e.*, the baby) to "Gloucester alive, you and I can easily destroy it coming along the causeway. When you are coming in, look and see if we can manage to drown it anyhow. Be sure you come, not let grandmother, that would do us altogether." After receiving this letter, the chief constable took Leah Banks into custody at Hartpury, and in her possession found parts of three letters in prisoner Elizabeth's handwriting. The letters bore no dates, but were apparently written after the prisoner

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Elizabeth's arrival in Worcester. In that which was apparently the earliest, was the following passage: "And, my dear girl, between Worcester and Hartpury between us we can easily manage to destroy the child." The second letter contained the following passage: "I am going to bespeak the woman next week, but it is possible I shall not have her none the more for that. I have me a box; I gave 2s. 6d. for it, and if I cannot carry my scheme into effect, I told them I was going to my aunt in Staffordshire, and she was going to bring the child up, and I should have to get my living, so I should not suckle it then. I will the morning as I start home give it a drop of lodnam, and slip it inside my box when going to the station. No one will have suspicion such a young thing as me having a child; and you and me can easily burry it; and amid your kindness and Ted's attention I shall soon forget the child. I shall have saved a sovereign by the time it comes off. You see to blind them I have had to buy calico." The following passage was in the third letter: "And besides this is the best place I could get, because as soon as my light is out they never interfere with my room; that is the only and best way I shall get out of it. Now don't you be foolish and think I shall be cast away, because if I get that it will keep life in me till the child is dead, which of course that will soon be if not attended to. Tell me, won't that be the best, my dear. What can I do with a young baby; I must and will destroy it somehow."

All the letters, which were of considerable length, expressed great anxiety and distress of mind on the part of both prisoners.

When taken into custody the prisoner Leah, admitting that she had written the letter received at Worcester on the 11th, said that she was afterwards sorry that she had done so, and that she had written to her niece immediately afterwards not to do anything in the matter.

398] *At the police cells in Worcester, on the following morning, she said — "I thought she had another fortnight to go, and wrote that letter thinking that would make her more easy in her mind; and then that somebody might be present when the child was born. I wrote her before, and if she has my letter she ought to give it up, telling her not to mind, for that we would work both day and night, and pay for the child, which we would put out. . . . What I did was to keep it from grandmother, as I was afeared it would break her heart."

No letter from Leah to Elizabeth, other than the one intercepted on 11th October, was produced at the trial, nor was any evidence given of any other letter.

Jelf, for the prisoners, contended that there was no evidence of conspiracy to murder a living child, as alleged in the first and

second counts; that the conspiracy, if it existed, referred to a child not yet born, and that the first and second counts of the indictment must, therefore, fail. As to the third count, he objected that the object of the conspiracy was too indefinite and remote; that a conspiracy must have an existing object to act upon at the time of its inception; and, also, that the acts charged were at most acts tending to the formation of a conspiracy, and were not done in pursuance of, nor to carry into effect a conspiracy already formed. As to all the first three counts, he contended that the letters proved no actual design existing between the parties; that the method suggested for destroying the child varied in each letter to Elizabeth, and that Leah's suggestion as to salts of lemon was entirely different. That each letter was a separate proposal, not accepted or assented to by the other party, and that, by analogy to a contract, no conspiracy could exist if parties were not *ad idem* in regard to object and means.

QUAIN, J., ruled that the first and second counts could not be supported by proof of a conspiracy only existing previous to the birth of the child, but that if the conspiracy previously formed was continuing at the time of the birth, the counts would be proved. That it was a question for the jury whether the conspiracy, if it previously existed, had or had not been abandoned when the child was born. And with reference to the third count, that it showed an object in the mind of each prisoner sufficiently proximate to be the subject of a conspiracy; and that the overt acts charged not being a material part of the count, it was unnecessary to consider their effect. With reference to the first three counts, it was unnecessary that parties should be agreed as to the exact means for accomplishing an end on which they were agreed.

Streeten abandoned the fourth and fifth counts, being content, as regarded Leah Banks, to rest this part of the case on the sixth count, charging that she, "incited Elizabeth to murder the child when it should be born," and pointing out that on that count she could be convicted of attempting to solicit and incite.

Jelf then contended that the sixth count must fail. 1. The *child was not born at the time of the alleged solicitation [399 by Leah contained in the intercepted letter posted at Hartpury on the 10th of October. 2. As the letter, being intercepted, never reached the hands of Elizabeth, the offense was never committed. 3. (In reply to Streeten's suggestions.) That there could be no conviction for an attempt to commit an offense which was itself an attempt (*e. g.*, an attempt to solicit or incite). With reference to the seventh, eighth, and ninth counts, Jelf raised the objection that the letter from Elizabeth of the 14th of October

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never came to the hands of Leah, and that there could be no conviction for the attempt on the ground above stated with reference to the sixth count.

QUAIN, J., ruled I, that the act of Leah in sending the letter of the 10th of October continued up to the time when the letter in the ordinary course would be received, unless some act were in the meantime done to counteract the effect of the letter, and that the jury must say upon the evidence whether the act did so continue or not. 2, That as the letters had been intercepted, the offense contemplated by the statute had not been committed. 3. That either or both of the prisoners might be convicted of the attempt. He offered, if necessary, to reserve all the points raised.

Jelf then addressed the jury on behalf of the prisoners.

QUAIN, J., in summing up, told the jury that before convicting the prisoners of a conspiracy, they must be satisfied that an agreement actually existed between Leah and Elizabeth to destroy the child when born. The jury must say whether the letter from Leah to Elizabeth, and the three previous letters from Elizabeth to Leah indicated any such agreement. A mere suggestion from one to the other would not be sufficient; but if the jury found that an agreement actually existed either before or at the time of the birth to destroy the child "somehow," it was not necessary that the means of destruction should have been agreed upon. If the jury found that a conspiracy existed previous to the birth, they would say on the evidence if it continued until the child was born. The statement of Leah to the chief constable had a most important bearing on this subject. With reference to the remainder of the indictment, the jury must say, with regard to Leah, whether or not she did any act to retract her letter written on the 10th before the time when it would, in the ordinary course, have been received by Elizabeth; and, as to both the prisoners, whether the passages contained in the intercepted letters were serious and deliberate solicitations or propositions for the murder of the child, or whether they were only the expression of wicked thoughts passing through the minds of the writers not intended to be acted on. They might in their discretion on the evidence find either or both of the prisoners guilty of attempting to propose to the other to murder the infant of Elizabeth.

The jury having found the prisoners guilty of the attempt to propose, a verdict was entered against Leah for the attempt 400] *under the sixth count, and against Elizabeth for the attempt under the eighth count.

QUAIN, J., sentenced Elizabeth to four months', and Leah to three months' imprisonment; offering to reserve the question

whether on the indictment the prisoners could be properly convicted of the attempt, but on behalf of the prisoners the point was not pressed.

Attorney for prosecution, *Pill*, Worcester.

Attorney for prisoners, *Clutterbuck*, Worcester.

NORTHERN CIRCUIT.

Durham, March 6, 1873.

[12 Cox's Criminal Cases, 400.]

REG. v. COTTON (¹).

(Before Mr. Justice ARCHIBALD.)

Murder — Poison — Intent — Evidence.

Where a prisoner was charged with the murder of her child by poison, and the defense was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible.

R. v. Geering, 18 L. J., M. C., 211, followed.

MARY ANN COTTON was charged with the willful murder of her son, Charles Edward Cotton, at West Auckland, on the 12th of July last.

C. Russell, Q.C., *Greenhow*, *Bruce*, and *Trotter* were for the prosecution.

Campbell, *Foster*, and *Part* were for the defense.

The deceased child was the son of the prisoner's late husband, and she had to support it. Evidence was given of her having repeatedly complained that she had to support it. She had, it appeared, an interest in its death, as its life was insured by her in the Prudential Insurance Office, and, at its death, she would be entitled to 4*l.* 10*s.* On the 6th of July, 1872, the child was well, and, although delicate looking, was active on that day; and at other times evidence was given of her having ill-treated it. On the 8th of July the deceased was taken ill, and [40] the prisoner sent for the doctor, and it was visited by him till the 12th of July, on which day it died. The deceased was buried after a somewhat hasty *post mortem* examination; but certain suspicious circumstances occurred which led to the body being exhumed, by an order of the secretary of state; the viscera were examined, and were found to contain arsenic. Mr. Kilburn, the parish doctor, a surgeon, who attended deceased, was called, and in his cross-examination, he said that he had prescribed

(¹) Reported by H. THURLOW, Esq., barrister-at-law.

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morphia, prussic acid, and bismuth to the child. The child had had fits and convulsions before it died, and morphia had been known to produce convulsions, but not, it was said, when it was administered in the doses which he prescribed. Prussic acid was a dangerous poison, but not taken in the doses he prescribed; and bismuth was an irritant poison, which, taken in large doses, might inflame the stomach and bowels, but he had only prescribed it in small quantities. He had sent twelve doses to the child; one preparation of bismuth. The subcarbonate, was frequently impure, and adulterated with arsenic, but only in minute quantities. He kept his poisons on a nest of five or six shelves. Arsenic was on the second shelf in a bottle about No. 5. Prussic acid was in a bottle next or next but one to it, about No. 6; and the subcarbonate of bismuth was in a bottle at the other side, about No. 2 or 3. Mr. Kilburn also stated he was aware that chronic poisoning by arsenic had been caused by the use of arsenical or green papers to walls. He did not think that the fumes of arsenic could arise from the arsenic used in the room, as fumes were only thrown off at a high temperature, about 280 degrees. It was proved by a charwoman named Dodds that about six weeks before the death of the child she was sent by the prisoner to a chemist's for two pennyworth of soft soap and arsenic, which were supplied to her mixed together. The chemist proved that he put in the soft soap from four to six drachms of arsenic, and mixed them. This mixture the charwoman rubbed into the joints and crevices of an iron bedstead to kill bugs, and also twice rubbed it over and between the iron cross-belts under the bed. A four-inch mattress was placed on this, and was sometimes turned, to prevent its wearing all on one side against the iron crossbars. Some of the soap was also used for the skirting-boards and near the fireplace on the floor. Nearly all was used, and the remainder was placed in a small jar in a lumber room. On a search being made at the house this jar was not found, and nothing containing arsenic. The paper of the room had a bright green fluffy flower on a stone colored ground. Mr. Scattergood, an analytical doctor of Leeds, was called, and proved having received the jars containing the viscera of the deceased, and the contents of the stomach, and also some articles found in the house of the prisoner. None of these latter contained poison 402] of any kind. He found traces of arsenic in the *contents of the stomach, in the substance of the stomach, in the contents of the bowels, and in the substance of the bowels, in the liver, and in the kidneys; none in the spleen. He estimated the total quantity at 2.60 grains. In his judgment, on these facts, he thought that repeated doses of arsenic had been administered, and that arsenic had been given shortly before death, because

it was found in the stomach. Two to three grains was sufficient to cause death, and half that quantity for a child. In his judgment the deceased had died from poisoning by arsenic. It was then proposed by the counsel for the prosecution to ask him if he had subsequently received several other jars containing the viscera of other persons, and had examined them. This question was objected to. The question was pressed, and *Reg. v. Geering* (18 L. J., M. C., 215), and *Reg. v. Garner* (3 F. & F., 681), were relied upon as authorities for the proposition.

C. Foster objected that, on principle, the evidence was not admissible, as collateral to the issue, as *res inter alios actæ*, and as prejudicing the fair trial of the prisoner on the issue joined by interposing other issues, or prejudicing facts, which the prisoner would not be entitled to explain by evidence or cross examination in the course of the case on which she was being tried. This might be extended to several collateral facts, each raising a different issue to be tried in the course of her trial. In support of this view, Taylor on Evidence, vol. 1, paragraphs 239, 298, 298a, and 306, were relied upon, and *Reg. v. Holt* (8 Cox C. C., 411), was cited, as in principle overruling *Reg. v. Geering*, a ruling at the Old Bailey by Chief Baron Pollock, Baron Alderson, and Justice Talfourd, twelve years before; and *Reg. v. Gardiner*, a decision of Justice Willis, at assizes, in accordance with *Reg. v. Geering* and *Reg. v. Fridge*, reported in 33 L. J., 74, in which *Reg. v. Holt* was cited and affirmed by the Court of Criminal Appeal, of which Chief Baron Pollock and Justice Willis were two of the judges constituting the court.

The learned judge said he would consult Baron Pollock, which he did; and on his return he said he had considered the point very carefully with his learned brother Pollock, and, on the authority of *Reg. v. Geering* and *Reg. v. Gardiner*, he thought he ought to receive the evidence.

Foster asked his lordship to reserve a case for the consideration of the Court of Criminal Appeal as there were conflicting authorities. His lordship said he must decline to do so, having made up his mind on the point.

The evidence of Mr. Scattergood was then resumed. He said soft soap might be washed from the mixture of arsenic, so as to leave the arsenic pure.

Evidence was then given of the death of a child named Frederick Cotton, a boy aged ten years, son of the prisoner, on the 10th of November last; of the death of Robert Robson Cotton, the prisoner's infant, aged fourteen months, on the 28th of March; * and of a man named Mattrass, on the 1st of [403 April, who then lodged with the prisoner. They were all attacked with vomiting and purging, pains in the bowels, and

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convulsions, and were all attended by the prisoner, and their food cooked for them. She was kind and attentive to them all. Mattress paid her eleven shillings a week for lodging and board, and was engaged to be married to her. A Dr. Richardson attended Mattress, and visited him seven days. He thought he had disease of the kidneys — Bright's disease — and believed he died of disease of the kidneys, but gave his certificate that he died from gastric fever. Dr. Kilburn attended the two children, and certified that the elder one died from typhoid or gastric fever, and that the infant died from convulsions in teething. Each of the three had been treated for the disease it was believed he had. Under an order of the home secretary, their bodies were exhumed in September and October last, and portions of the viscera of each were sent to Mr. Scattergood, and in each he found traces of inflammation from irritant poison, and the presence of arsenic. In Mattress he found seventeen and a half grains in the stomach. His opinion on these facts was, that each had died from the administration of arsenic. In the course of his cross examination in the case. Mr. Scattergood admitted that soft soap and arsenic would dry from exposure to air; that a heated room would assist to dry it, and that a mattress, or any portion of it, would absorb moisture from the soap. If dry, the attrition of the crossbars of the bed over one another, from getting in and out of bed, would be likely to cast dry particles on the floor. If nearly all the soft soap and arsenic had been used by Mrs. Dodds on the bedstead, about three hundred grains of arsenic must be there; this, by trampling on the floor and on the carpet, might be raised as dust floating in the air, and, like Scheeles' green wall papers, might cause irritation and dryness in the throat and eyes, and, by means of the lungs, become absorbed into the system, but could not get into the contents of the stomach. No doubt the quantity of arsenic was much greater than could be rubbed off any wall paper.

This was the case for the prosecution.

His lordship said there was no evidence of the possession of any arsenic by the prisoner before the death of the three persons, evidence of which had been interposed.

Mr. *Russell* said the witness who could prove this had just been confined, and he proposed to put in her deposition. This had been given in Mattress's case.

Mr. *Foster* objected.

POLLOCK, B., said he was of opinion that the depositions could not be put in.

Guilty.

NORTHERN CIRCUIT.

(12 Cox's Criminal Cases, 404.)

Manchester, March 31, 1873.

(Before Mr. Baron POLLOCK.)

*R. v. HESELTINE.

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Arson — 24 & 25 Vict. c. 97, s. 7 — Indictment — Want of certainty — Averment of intent — Evidence.

It is not necessary in a count in an indictment laid under sect. 7 of 24 & 25 Vict. c. 97, to allege an intent to defraud, and it is sufficient to follow the words of the section without substantively setting out the particular "circumstances" relied on as constituting the offense.

Evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to.

JAMES HESELTINE was charged with arson. There were three counts in the indictment. The first and second were under sect. 3 of 25 & 26 Vict. c. 97, s. 1., and the third was under sect. 7 of that act. The first count was for arson of a house, with intent to defraud. The second count was for arson of the house with intent to injure. The third count was for arson of certain things in the said house under such circumstances as, if it had been arson of the house, it would have been a felony. There was no allegation of intent to defraud.

Leresche and *Addison* were for the prosecution.

Charles Russell, Q.C., and *Hopwood* were for the defense.

The prisoner kept a grocer's shop, situate at the corner of Deansgate and Fleet street, in Manchester. Upon the day on which the alleged offense took place, somewhere between ten and eleven o'clock at night, an alarm reached the city fire-police station, which is situated not very far from the shop in question, viz., in Jackson's row, that a fire was raging. A number of the brigade went to the spot, and found the shop in flames, the fire bursting out from the top of the shutters. The firemen immediately took such steps as soon enabled them to subdue the flames. Afterwards, Mr. Henderson, a police inspector, went over the premises and examined the shop. In the centre of the shop, on the customers' side of the counter, where there was a pillar which supported a beam, a large number of boxes were found, and particularly a large wooden one: this [405 was all charred and burnt. The size of the box was about three feet by two, and in it were shavings, straw, lucifer matches, paper, chips of wood, and rubbish. The matches were not only in boxes, but there were a great number of them loose. On the top of the box was an old basket filled with similar stuff, and

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on the top of that was an old tub, which was packed in like manner. The boxes and tub, on being examined, smelled very strongly of paraffin oil. Among the contents were found a number of candle wicks and pieces of cotton fabric, which were wound in rolls, had been lighted at each end, and were saturated with paraffin oil. Whilst Mr. Henderson and Superintendent Tozer were on the premises prisoner walked in, and from something which Henderson said to Mr. Tozer, the latter drew prisoner into an adjoining room, where, in answer to a question, he said the box which had been found had been packed ready to be dispatched to a customer. Henderson then stepped in, and said, "Would you mind telling me who the customer is, Mr. Heseltine?" Prisoner replied, "Yes; the customer lives in Yorkshire." Henderson then further questioned him, and, in answer, he said the parcel was for his father, who lived at Snapes Castle, Bedale, Yorkshire. His father had written for it, but he had burned the letter. He never kept letters from home. He had made no invoice of the contents of the box, but he knew generally what it contained. He was not aware that he was insured; he might have thought so. It was not his shop, he was only a servant there for his brother, who was in Yorkshire, and had been in Manchester only for about two months. His brother paid him one pound a week for his services. His brother suffered very much from bad health, and was not able to be in Manchester much. During the conversation prisoner's brother Henry came in, and prisoner and his brother were informed that they would have to be taken into custody on suspicion of having set fire to the shop. Prisoner then said he had been to the circus, and left the shop about halfpast eight o'clock. He went to the circus to meet some friends by appointment. Henderson remarked that prisoner was the last person seen on the premises, and that he locked the shop up. Prisoner acquiesced in this, and, in answer to a question, said he did not keep paraffin oil in the shop, and that he could not account for the smell. Afterwards, alongside the large box, a number of smaller ones, tea boxes, were found. Some of them were filled with chips and rubbish, and some were filled with tea. Next day, when the house and shop were gone over, the amount of stock and furniture was found to be exceedingly small, the valuation not reaching more than 300*l*. In July, 1871, prisoner effected a policy with the Royal Insurance Company for 600*l*., and the last premium he paid was in July, 1872. The policy was effected for 100*l*. on the household goods, and 100*l*. on the trade fixtures, and 400*l*. on stock, &c. Some invoices half burned were found in the shop, and they were mostly made out 406] to John *Heseltine. Two bills of exchange were found,

which had been drawn upon and accepted by J. W. Heseltine; and Mr. Henderson had, since the occurrence, ascertained that the name of the prisoner was James Whetton Heseltine. Mr. Henderson, in cross-examination by Russell, said he had made inquiries, and had found that prisoner's father did live at Snape Castle, and that he was a farmer. He also ascertained that prisoner's brother had been ill just before the fire, but he had not ascertained that he had been at the shop in question. He had found out the prisoner's brother's name was John, and that he was a draper, carrying on business at Bedale, Yorkshire. John Moulton, a fireman, deposed to finding that the greatest amount of fire was in the centre of the shop. He asked prisoner how the box came to be in the middle of the shop filled with matches, and he replied that it had come in that day. Mr. Superintendent Tozer, of the Manchester fire brigade, said that, on arriving at the shop on the night of the fire, at about thirty-five minutes past ten o'clock, he found in the centre of the floor a box, containing a basket and a tub, a quantity of shavings, some sawdust, a great quantity of lucifer matches, some in boxes and some loose, and several small bundles consisting of candlewick and calico pinned together. The contents of the box were saturated with paraffin. William Thompson, a chemist in the employ of Professor Calvert, said that he had examined several bundles which had been given to him by Badley. They were all soaked with mineral oil and grease. The first parcel contained pieces of cloth and candlewicks. It was then proposed by the prosecution to give evidence of certain experiments made by Superintendent Tozer, of the fire brigade, with a view of showing the manner in which the house was set on fire; these experiments were made with candles of different lengths, prepared similarly to the candle ends found in the *debris* of the fire; and their object was to support the theory of the prosecution that the fire had been planned, and everything set in train by the prisoner for its breaking out at the hour it did before he left the house.

Charles Russell objected to such evidence being admitted. But POLLOCK, B., ruled that it might be admitted. The evidence was then given. This closed the case for the prosecution.

Charles Russell now contended that the indictment ought to have averred how and in what manner the circumstances charged in the count in question arose; it was, therefore, bad for want of certainties. There was also no allegation of intent to defraud: the count was bad on this ground also.

Lecresche said, it appeared to him the question on the third count was raised as a purely speculative question. The evidence was distinct on the first and second counts of the actual setting

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fire to the building itself. With regard to the third count, he 407] *contended that it distinctly set forth the offense sufficient for the purpose of the act. His lordship said he would consult with Mr. Justice Archibald, who was sitting in the other court, on this matter, and retired for that purpose. On returning into court, he said Mr. Justice Archibald agreed with him in thinking that the count was good. He proposed that the evidence for the defense should be called, after which the jury could find upon each count. *Not Guilty.*

COURT OF QUEEN'S BENCH.

Thursday, May 8, 1878.

[12 Cox's Criminal Cases, 407.]

REG. (on the prosecution of J. C. GRAVES) v. AUNGER.

Label — Criminal information — Duty of relator to negative specific charge — General denial.

Where newspaper articles charged the relator with partiality from political motives, in the manner in which he discharged his duties as presiding officer at an election for members of a school board, and mentioned a specific instance where he had rejected the vote of a duly qualified female voter, who was politically opposed to him, though the relator in his affidavit denied generally the truth of all the charges, and also denied that he refused any voter on political or improper or illegal considerations, or prevented directly or indirectly any voter, who was legally qualified to vote and who observed the prescribed regulations, from voting, or put any obstacles in the way, or did anything, at any time, calculated improperly to affect the election of any particular candidate.

The court discharged a rule *nisi* for a criminal information which had been obtained against the publisher of the newspaper, because the relator had not negatived specifically the charge made against him as to the rejection of the female voter's vote.

In this case a rule *nisi* had been obtained by Sir. J. B. Karslake, Q. C., calling upon Edmund Aunger to show cause why a criminal information should not be exhibited against him for certain libels upon John Coupland Graves, the relator, contained in articles published in a newspaper belonging to the said Edmund Aunger.

408] *It appeared from the affidavits that the relator, John Coupland Graves, was, on the 14th Aug., 1872, elected an alderman for the St. Aubyn ward of the borough of Devonport, and has since acted as alderman within that borough. On the 1st Nov., 1872, an election of a town councillor for the St. Aubyn ward of the borough took place, and Mr. Graves presided at the polling station of the ward at the Town Hall. On the 9th Nov., 1872, there appeared in *The Western Globe* newspaper, of which Mr. Aunger is the proprietor, the following paragraph with reference to the election :

St. Aubyn Ward was contested in a manner worthy of the objects which prompted to action. With a perfectly new candidate, only issuing his address to the electors four or five days before the election, the ward was so ably worked as to bring the candidate within four votes of an old politician councillor, versed in all the arts of radical tactics. There was also the disadvantage of putting forward one candidate only. Nor do we think it exactly in place for a presiding alderman, in addition to his legitimate duties, to be writing and sending out circulars to the voters in the ward of which he is chairman, to induce his party to vote. Has not the presiding alderman enough to do without thus acting the partisan in the way indicated? and is not such conduct sufficient to raise suspicion as to the impartiality which a presiding officer ought to maintain in discharging the duties of his office?

On the 6th Dec., 1872, an election of a member for the school board of the borough of Devonport was held, at which Mr. Graves presided at the polling station, in the Town Hall. On the 14th Dec. in the same year, there appeared in *The Western Globe* an article commenting on the manner in which the election took place. The following was the article:

RADICALS AS PRESIDING ALDERMEN.

Nothing could more forcibly prove the necessity of putting men of irreproachable character into public offices than the conduct of certain individuals in Devonport during the recent school board election. Incidents which we are about to notice would never occur but that men are put into office, not for moral worth, but for the political services they have rendered their party. It is with pride we make the contrast between the two political parties; and, speaking locally, we can say that the conservatives of Devonport would be ashamed to do the mean and dirty tricks which the radicals are constantly perpetrating. At the late municipal elections we had occasion to call attention to the conduct of a presiding alderman, but mild remonstrances appear to be of no avail. Radicals can seldom be put to the blush unless their conduct is stigmatized to the full extent which it deserves. On the 1st Nov. last the same presiding alderman of whom we now complain, while supposed to be attending to the duties of his office, was constantly sending out letters and notes to voters of the ward, the contents of which none but his own party knew. It might be as to how the voting was proceeding or influencing votes in some way or other. To say the least of such proceedings, they are in utter contravention of the law; and the man in such a responsible position who has been once guilty of this conduct ought not to be appointed to such duties again. On Friday last, the day of the election of a member for the school board, the same presiding officer, who was joined by an accomplice, rejected the vote of a female, and compelled her to leave the polling booth. Having more spirit than many ladies she repaired to the residence of a friend of the candidate for whom she intended to vote. He returned with her to the booth; she insisted on the vote being taken, which was then done. We need scarcely say that the voter was politically opposed to the views of the presiding officer. There is reason to suppose that many other votes were rejected in the same way, the parties perhaps not knowing by what means to obtain redress. As we have before stated, a clear case of this kind, such as we are enabled now to produce, ought to be sufficient ever afterwards to preclude the same official from presiding on a similar occasion. Several obstacles were thrown in the way of opponents voting at other polling booths, which renders it difficult, if not almost an impossibility, for a hostile candidate to succeed, when the polling booths are presided over by an unprincipled man.

*The paper of contents of *The Western Globe* of the same [409] day contained, amongst other items, one in these words: "Radicals as presiding aldermen. Trickery at polling booths." On the 21st Dec., 1872, there appeared in *The Western Globe* a letter in the following words:

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To the editor of *The Western Globe*. Sir,—It does seem a ridiculous thing for the ratepayers of Devonport to pay a clerk a large salary for legal advice, and when such a person is called on to give that advice, or to speak plainer, when he is asked to give his opinion (as Mr. Venning was last week on a most simple point of law, viz., whether or not the ratepayers of Devonport are bound to elect a certain public officer—I need hardly say that we have too many of them already) he either will not or cannot (perhaps the latter) give the answer required. Mr. Anstey's straightforward question deserved equally as straightforward an answer, instead of an evasive reply, and that too by a person of whom the councillors hear quite enough, and who, if he had to come to the ratepayers to be elected to the office he at present holds, would stand as much chance of election as "Van Dagrum;" I refer to Mr. J. W. W. Ryder. It seems that that gentleman acts as attorney or counsel, or as the local papers nominally style him, "lord chancellor" for certain public offices connected with this town. He must be a very liberal minded man, more so than I should have thought, to throw away all his talent for the benefit of other men's pockets; for I can assure you the rats think him a great lawyer. The result of the last council meeting on the whole is but one more instance of the exposure the radicals have submitted themselves to in the eyes of the ratepayers, as being incompetent to deal with the affairs of the town honestly and fairly. Another proof of that was shown us by the exposure of the conduct of Alderman Graves (who knows more about drapery than the Ballot Act), of Wesleyan schoolroom notoriety, in refusing to take the vote of a supporter of Mr. Aunger at the late school board election. I should have thought, after the severe rubbing the radicals received on the 1st Nov. last, they would not have tried to make matters worse for themselves; but they have done so; and let me tell them that the 1st Nov., 1873, will show a majority of conservatives in the council, when no notice will be taken of the mayor's snubbing remarks, when the affairs of the town will be managed by honest, trustworthy, and impartial men, and when the ratepayers' money will be expended usefully and economically. One word more and I have done. I hope if the town council can't get advice from their clerk when they want it, they would do the same as a private firm would under similar circumstances, and that is employ some one that can and will. I remain, Your obedient servant, — RATEPAYER.

Mr. Graves, in his affidavit, on which the rule *nisi* had been obtained, as to the allegations of misconduct in each of the publications above set out, stated as follows:

It is wholly and entirely untrue that during the time I was presiding [at the election referred to in the publication of the 9th Nov., 1872], I was either writing or sending, or causing to be written or sent, any letter or circular to the voters of the ward of St. Aubyn to induce them to vote, or that I acted the partisan in the way indicated in the said paragraph, or in any other way, nor did I in any way conduct myself otherwise than with entire impartiality at the said election in discharging the duties of my said office at the said election.

All and every the charges and imputations against me contained in the said paragraph are wholly untrue.

Throughout the election I acted according to the best of my judgment, and according to what I then believed and still believe to have been my public duty. I had no interest whatever in the result of the said election, and no bias or cause of bias in my mind for or against any of the candidates at the same, and I did not at any time do anything calculated improperly to affect the election of any particular candidate.

As to the publication of the 14th Dec., 1872, the affidavit of Mr. Graves stated as follows:

I was not constantly sending out letters and notes to voters of the said Clowance ward at the said school board election, in order to tell them how the voting was proceeding, or to influence their votes in any way, nor did I send out any letters

or notes, either to tell the voters how the voting was proceeding, or to influence their votes. I did not at any time improperly influence or attempt to influence votes at *the said election for a member of the said school board, nor did I [410 at such election refuse any votes on political, or improper, or illegal considerations, nor did I prevent directly or indirectly any voter who was legally qualified to vote, and who observed the prescribed regulations, from voting at such election, nor did I directly or indirectly put any obstacles in the way of any voters voting at such election.

Throughout the said election for the school board of the borough of Devonport, I acted according to the best of my judgment, according to what I then believed and still believe, to have been my public duty, I had no interest whatever in the result of the said election, and no bias or cause of bias in my mind for or against any of the candidates at the same, and I did not at any time do anything calculated improperly to affect the election of any particular candidates.

All and every of the said charges and imputations against me, contained in the said last mentioned article are wholly untrue.

The affidavit contained a denial in similar terms of the charge contained in the letters, signed "Ratepayer," which had been published in *The Western Globe*. Mr. Aunger filed the following affidavit, sworn by himself, in reply :

I am the secretary of the Conservative Association of the borough of Devonport, a member of the town council, and one of the local commissioners for the said borough.

John Coupland Graves is one of the most active members of the Liberal Association for the said borough, and states publicly that he is a nonconformist, and takes a very prominent part in all the public and political meetings in Devonport.

Previous to the 1st Nov. last the said John Coupland Graves, knowing I was secretary to the Devonport Conservative Association, called at my house with a view to effect certain compromises in reference to the then approaching municipal elections, and we discussed the subject freely.

On the 1st Nov., 1872, being the day of the municipal elections, the said John Coupland Graves was the presiding alderman for St. Aubyn ward, and during the time he was so presiding several complaints were communicated to me, as the secretary of the Conservative Association, that the said John Coupland Graves, whilst taking the voting papers from the burgesses, was constantly writing notes, taking them out of the room, and sending them away, and from the fact of his being known as an unusually strong partisan, the secretary of the said ward and the agents of the conservative candidates, who were in the polling room during the time of election, considered such conduct highly indiscreet, and calculated to prejudice the interests of the conservative party, and in opposition to the spirit of the Parliamentary and Municipal Elections Act.

In consequence of the complaints of the conservative secretary of the said ward, and the agents appointed by the conservative candidates, and statements made to me by various other persons, I permitted the publication of the article referred to in the third paragraph of the affidavit of the said John Coupland Graves, fully believing the statements contained therein were true, and I deny that the said article was inserted in the said newspaper with any malicious feeling whatever against the said John Coupland Graves. It appeared to me, however, that the conduct of the said John Coupland Graves, as reported to me, constituted a legitimate subject of comment on the part of a public journalist.

Previous to the 6th Dec., 1872, I was a candidate to fill a vacancy in the school board of Devonport, and during my candidature I was opposed most energetically by the said John Coupland Graves. I held several meetings in the borough for the purpose of making my views on the subject of education in public elementary schools known, and having previously obtained permission of the Wesleyan ministers and trustees to hold one of such meetings in one of their schoolrooms, I publicly advertised that such a meeting would be held. On the evening of the meeting the said John Coupland Graves attended with others, and at the time of

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the commencement of the meeting he endeavored to prevent it being held, by stating publicly I had obtained possession of the room by false representations, and was not justified in making any statements there. The said John Coupland Graves obstructed the proceedings of the meeting, and great confusion took place. Amongst other things the said John Coupland Graves publicly stated that Mr. Walters (one of the trustees) had been to my house, and told me I had obtained the room under false pretenses, which statement is untrue, as will appear on reference to the affidavit of the said Mr. Walters sworn in this matter.

411] *The statements in question, with many others of a similar character, were printed in a handbill (a copy of which is now produced and shown to me, marked with the letter "A") which was posted about the town of Devonport, for the purpose of injuring me and damaging my prospect of being elected a member of the school board.

The election of a member of the school board took place the 6th Dec., 1872, when the said John Coupland Graves was appointed to preside over Clowance ward, as returning officer, although he was not at that time presiding alderman for any ward in the borough. During this election complaints were made to me by my agents and others that the said John Coupland Graves had refused to record the vote of a duly qualified Burgess, and having reason to believe that such was the case, I made inquiry, when I found that the said John Coupland Graves had rejected such a vote, but, on being remonstrated with, subsequently recorded it. On the following Thursday (Dec. 12), a meeting of the town council was held, when I asked for an explanation of the conduct of the said John Coupland Graves, but my questions were ruled out of order, and the said John Coupland Graves did not make any reply to my statements.

The paragraph referred to in the eighth paragraph of the affidavit of the said John Coupland Graves was written without any malicious feeling whatever towards him, and the remarks contained in the article published on the 14th Dec., were mostly of a general character, and such expression as "disreputable persons" were intended to apply in general terms to the speakers at a meeting held on the 5th Dec., by the supporters of Mr. Mitchell, a candidate for the office of member of the Devonport school board. At the meeting at which the said John Coupland Graves was present and took part, one of the speakers, a Mr. McKay, described me as not fit to sit with gentlemen on the school board. Another speaker, Mr. J. W. W. Ryder, stated he had never known me to make a practical suggestion for the benefit of the ratepayers; I was a man entirely unworthy the confidence of the ratepayers, and certainly not the man to sit with gentlemen on the school board. The chairman also remarked that the town council of Devonport was a respectable body with one exception, and that exception was myself (the said Edmund Aunger). The said John Coupland Graves also spoke at the said meeting, and said he fully endorsed all the previous speakers had said.

In consequence of these remarks made at the meeting of the 5th, there was published on the following day, in a paper called *The Devonport Independent*, an article under the head of School Board Elections, in which appears the following: "On the side of the denominationalists Mr. Aunger was selected as the candidate. The precise manner of the selection, however, was not made very clear, and a few mistrusted its straightforwardness, and disapproved of the man selected. Mr. Aunger gave the war whoop, and began to stump the wards. He first appeared at the Morice street Wesleyan schoolroom, where, to say the least, a very smoky effort was made to get the support of the Wesleyans. He was taken down considerably more than a peg, and administered a very severe rebuke, not merely in regard to the call of that particular meeting, but to the presumption of coming forward at all as a candidate, and especially to represent the more religious and respectable portion of the community. Never in the world was a man placed in a more ignoble position. Never had a man a more withering and contemptuous snubbing. It would have been a mortal blow to the life, much more to the candidature, of any man, whose dignity, self-respect, conscience and principles, are not encased in a pretty thick shield, through which no contempt could penetrate."

From the date of the publication of the articles referred to in the third and eighth paragraphs of the affidavit of the said John Coupland Graves, down to the 30th Jan. last, I had not the slightest intimation from the said John Coupland Graves, or any

one on his behalf, that he considered the said articles in anyway reflected on his character, or that he supposed he was in anyway injured by them. In fact the first intimation I received was through reading in the newspapers of the application he had made to the court for a rule to show cause why a criminal information should not be filed against me.

With reference to paragraph 12 of the affidavit of the said John Coupland Graves, I say that the letter therein referred to was inserted by the printer without my knowledge, and I only became aware of the contents whilst the paper was being printed. As soon as my attention was called to it I had the contents altered by the omission of the entire paragraph referring to Mr. Graves. This I did from a desire not to allow any further reference to the elections to be made, as I considered the elections being over the matter should be allowed to drop.

Another affidavit filed in opposition, that of Fanny William.s, *stated that she was one of the burgesses of St. Aubyn [4]2 ward, in the borough of Devonport; that at the municipal election on the 1st Nov., 1872, she attended at the polling booth for the said ward, and tendered her vote to John Coupland Graves, who there acted as presiding alderman, and who positively refused to receive her vote, although she was legally qualified to vote, which qualification she subsequently used by voting for Mr. Mitchell, a candidate for membership of the school board, on which occasion no objection whatever was taken to her vote; that the said John Coupland Graves knew her personally, and knew that she was opposed to him in all political matters; that no change had taken place with reference to her qualification as a burgess, and that both elections were conducted upon the same roll or list of burgesses. A further affidavit, that of Jane Treleven Tippet, stated that she was one of the burgesses of Clowance ward; that on the 6th Dec., 1872, the day of the election of a member of the school board, she attended at the polling booth of the said ward, for the purpose of voting for Mr. Aunger, who was one of the candidates; that Mr. John Coupland Graves, who then acted as returning officer, said on her entering the booth, "The name?" and, as he did not say "your name," she thought he meant the name of the candidate for whom she intended to vote; and she replied "Aunger" as distinctly as possible; that he immediately replied, "There is no such name, and you are not entitled to vote;" that she then left the booth and made inquiries, and having procured a burgess list took it with her again into the polling booth, and pointed out her name to the said John Coupland Graves, who, after some hesitation, received her vote; that she was well known in the Clowance ward, and never had any trouble in recording her vote on a former occasion; that she believed that the said John Coupland Graves knew when she said "Aunger" that she referred to the candidate's name, and not to her own, as she was an opponent of the political party of which the said John Coupland Graves was an active member, and that he must have

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been well aware that she was qualified to vote at the said election; that she has since heard of persons who mentioned the candidate's name instead of their own at the various polling booths, but whose votes were never refused on that ground; that from the hasty and abrupt answer of the said John Coupland Graves towards her she believed he intended taking advantage of her mistaking his question, and did not intend to record her vote. Other affidavits filed in opposition related to the other matters referred to in the affidavit of Mr. Aunger above set forth.

H. James, Q.C., and *Pinder* showed cause against the rule, and contended that there was nothing in the article published on the 9th Nov. to justify the court in granting a criminal information.

[BLACKBURN, J. That might be so if the article of the 9th Nov. stood alone; but in the subsequent articles a specific and very grave charge is made.]

A specific charge is contained in *later articles that Mr. [413 Graves rejected the vote of a workman who was duly qualified to vote, and who was opposed to his political views. To that specific charge Mr. Graves gives no specific denial in his affidavit, but only a general one, and that is not sufficient where a relator asks the interposition of this court in his favor, by granting a criminal information. As to the last publication complained of, the paper in which it was contained was suppressed by Mr. Aunger as soon as he was made acquainted with its contents, and an apology was made to the relator for it, before any proceedings were instituted on his behalf.

Sir *J. B. Karlake, Q.C.*, and *Charles* in support of the rule were directed to confine their attention to the question, whether the relator had or had not brought fully before the court all the facts connected with the charge of rejecting the woman's vote. They contended that a sufficient denial was given to the charge by the words of the relator's affidavit, that he "did not refuse any votes on political, or improper, or illegal considerations," or "prevent directly or indirectly any voter who was legally qualified to vote, and who observed the prescribed regulations, from voting," or "directly or indirectly put any obstacles in the way of any voters voting" at the election. [BLACKBURN, J. But the charge made against him mentions a specific instance to which he does not allude.] The sting of the charge is that he acted from political and corrupt motives, and he denies that in any particular instance he did so. [BLACKBURN, J., referred to *Rex v. Haswell and Bate* (1 Doug., 387), where there was a charge of treason made against the Duke of Richmond, and the duke having made an affidavit stating generally that the charges

were false, scandalous, and malicious, one of the judges (Willes, J.), said he did not see how the court could make any distinction between the duke and the lowest individual, and that there must be a specific denial of the particular charges; and the duke was compelled to file another affidavit denying the charges specifically.] If the affidavit of the relator is insufficient, the court should give him permission to amend it. [BLACKBURN, J. I think it is now too late to ask for that.]

BLACKBURN, J. I think there is no doubt as to the course we ought to take in this case. As I stated the other day in the case of Mr. Plimsoll, a restriction is put on the power of the coroner or attorney to prefer a criminal information for libel in this court; that is to say, it must be done by leave of the court given in open court. That practice was first instituted in Lord Mansfield's time, and has for more than a century existed, and it has been found to be of great public benefit. Since that time this court has acted on the principle that in a matter like a criminal information, the object of which is to punish a man, the court will not grant it unless the circumstances are such as to show that the relator not only has the object in view of clearing his character, but that he is also a proper person to be entrusted with it, and that the circumstances are such as to render the proceedings a public benefit. *When a relator has brought [414] forward a charge against any one in this court, and has applied for a criminal information against him, and the court has granted the rule, the court has often subsequently discharged the rule on the party against whom the criminal information was asked apologizing and paying the costs. But all persons in the position of relators, are, according to the practice which has existed for a long time, bound to satisfy the judges, who do not act on technical rules at all, but as men of the world and men of common sense, upon affidavits that they themselves are free from blame, and are fit and proper persons to be entrusted with the prerogative of this court, and they are to do that in the teeth of the other side, who have an opportunity on affidavit of persuading the court, if they can, that such persons are not so. We should deprive persons of that benefit, and put an end to the benefit if we did not in all cases adhere strictly to that rule. In Mr. Plimsoll's case we gave time to show by affidavits that he was free from blame, in order that the court might be quite secure, and that the applicant in the case (Mr. Norwood) should be able, if the rule should be made absolute, to say that Mr. Plimsoll had an opportunity of answering the matters alleged if he could, and of clearing his character. In the present case the party who has had to show cause has not satisfied us that that requisite has not been met. That being the object of the

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procedure upon a criminal information, it is of the highest importance that the relator should in all cases bring before the court all the circumstances fully and candidly, where there has been a specific charge, in order that the court may deal with the matter. Ever since the case of the *Queen v. Haswell*, the *Duke of Richmond's case* (1 Doug., 387), it has been the inflexible rule that the relator should negative the charges which are brought forward, but where the facts are such that he can negative the facts successfully, and he avoids doing that and passes over them lightly, the rule must be discharged and with costs. Now in this case I pass entirely over the article of the 9th of November, because although there may be something in that which is libellous, and probably a matter of action or a matter of indictment, I do not think it is of such gravity that the court would make the rule absolute upon a criminal information. Then on the 14th there was a specific charge made, which is so pointed that I think we should have said that it was a matter for a criminal information if the matter had come clearly before the court, and it had not been shown that there was something more. As to that, this is the statement in the article complained of: "On the 1st of November last, the same presiding alderman of whom we now complain, while supposed to be attending to the duties of his office, was constantly sending out letters and notes to voters of the ward, the contents of which none but his own party knew. It might be as to how the voting was proceeding or influencing votes in some way or other. To say the least of such proceedings, they are in utter contravention of the law, and the man in such a responsible position who had once been guilty 415] *of this conduct ought not to be appointed to such duties again. On Friday last, the day of the election of a member for the school board, the same presiding officer, who was joined by an accomplice, rejected the vote of a female, and compelled her to leave the polling booth. Having more public spirit than many ladies, she repaired to the residence of a friend of the candidate for whom she intended to vote. He returned with her to the booth; she insisted on the vote being taken, which was then done. We need scarcely say that the voter was politically opposed to the views of the presiding officer. There is reason to suppose that many other votes were rejected in the same way, the parties, perhaps, not knowing by what means to obtain redress. As we have before stated, a clear case of this kind, such as we are enabled now to produce, ought to be sufficient ever afterwards to preclude the same official from presiding on a similar occasion," &c. That is a very specific statement, and no doubt the gravamen of it is very serious. The gravamen of it is, that the presiding officer acted as a partisan in conduct-

ing the ballot, and a very serious imputation that is. It is pointed to a specific instance of a female being rejected, and then when she came back being admitted. Mr. Graves in his affidavit omits to make any statement in reference to that particular case. He does not say that he does not know who the female was, and that he cannot conceive who the female was, and that there is nothing that he remembers about the female, nor does he say what he did, if that was the case, or that a particular female came and he rejected her vote for such and such reasons, and afterwards set it right. But passing that over, he says this: "I did not at such election refuse to take the vote of any qualified supporter of Mr. Aunger, nor did I prevent any voter who was legally qualified to vote, and who observed in all respects the prescribed regulations, from voting at such election, nor did I put any obstacle in the way of any voter voting at such election." That is the general statement he makes. Now Miss Tippet comes forward and says that, on the day of the election of a member of the school board, she attended at the polling booth for the purpose of voting for Mr. Aunger, who was one of the candidates; that Mr. J. C. Graves, who then acted as returning officer, said, on her entering the booth, "The name," and as he did not say "Your name," she thought he meant the name of the candidate for whom she intended to vote. She replied "Aunger," as distinctly as possible. He immediately replied, "There is no such name, and you are not entitled to vote." She then left the booth. She does not say she was turned out. There may be a little exaggeration in the other statement in consequence of the presiding officer's conduct. "I then left the booth and made inquiries, and having procured a Burgess list, I took it with me again into the polling booth, and pointed out my name to the said J. C. Graves, who after some hesitation received my vote." Then she goes on to say, that she has heard of persons who mentioned the candidate's name instead of their own at various polling booths, but whose [416] votes were never refused on that ground. Taking that to be true, there is a great deal of color in the argument which has been addressed to us by Mr. James. But I do not go upon that ground and say that that is sufficient in itself, but upon the ground that Mr. Graves, knowing such detailed accusations had been made in the article of which he complained, ought to have stated all he knew about it; in which case probably this rule would not have been granted. He has not brought these details before us, and this rule must be discharged with costs.

QUAIN, J. I am of the same opinion. If it is not the universal rule, it is the general rule where specific charges are brought that the party applying for the criminal information must deny

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the charge specifically, or give his reasons why he cannot deny it, or state on oath that he does not understand the imputation. Here Mr. Graves has done neither. He has not explained about neglecting this lady's vote, nor has he said that he is unable to recollect such a case. He has merely confined himself to a general denial that he never rejected for political reasons any vote of any person duly qualified to vote. It is clear that that is not a sufficient denial of the charge. It must be denied specifically, according to the rule laid down by Lord Mansfield in the case that my brother Blackburn referred to. We must adhere to that rule in this case, and therefore this rule will be discharged.

ARCHIBALD, J. I am of the same opinion. When a party is assailed by a grave and serious libel, he has two courses open to him; he may either bring an action, in which case the defendant will be heard; or if the charge is of such a character that he is not to be satisfied with proceedings of that kind, he may apply to the court and waive his right of action. But I think it is a safe rule where he takes the latter course, to say that he must deal with perfect candor with reference to all the circumstances of the case, and he ought to make it appear not only that he is free from blame, but that his conduct is such that there is no color for the imputations cast upon him. It cannot be said in this case, where a pointed charge of this kind is made, and his attention called to it, that that has been satisfactorily done. Therefore the rule must be discharged. *Rule discharged with costs.*

Attorneys for relator, *Wedlake and Letts.*

Attorneys for Mr. Aunger, *Nelsons.*

CENTRAL CRIMINAL COURT (OLD COURT).

April Session, 1870.

(Before Mr. Justice LUSH.)

[12 Cox's Criminal Cases, 443.]

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*REGINA v. WOODHURST (¹).

Carnal knowledge of girl under twelve — Consent extorted.

On an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault.

Held, on the latter count, that, although consent would be a defense, consent extorted by terror or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect.

Quære, if such consent can be given in such a case by a child who is not *sui juris*?

THE prisoner was indicted for having, in October 1868, carnal knowledge of a girl above the age of ten years, and under

(¹) Reported by W. F. FINLASON, Esq., Barrister-at-law.

twelve, with her consent. In a second count he was indicted for an assault.

Platt for the prosecution.

Langford for the defense.

The prisoner was a strong powerful man, and the girl was his daughter, a child who, at the time in question, was but just above ten years of age. According to the evidence—confirmed to some extent by other witnesses—he had been in the habit of tampering with her person; and on the last occasion there was some degree of penetration, which gave her pain, and for some reason it did not appear to have been repeated. One of the witnesses—the prisoner's son—one night saw the child in his father's bed, and according to his account what occurred was not resisted or resented, and he reproached her with it. From something long afterwards overheard by a woman with whom the prisoner lived, he was accused of tampering with her, and being taxed with it in her presence—though he denied—she declared he had meddled with her. He thereupon said he had not ruined her, which was represented by his counsel as meaning that he had not completed the crime. The doctor stated that penetration had taken place to *some extent, but as it was so long ago he could not say more. [444]

LUSH, J. (to the jury). Upon the first count, which admits the child's consent, you must be satisfied that the act was completed, i. e., that there was some extent of penetration. On the second count, you cannot convict if there has been consent, as an assault excludes consent. But consent means consent of will, and if the child submitted under the influence of terror, or because she felt herself in the power of the man, her father, there was no real consent, and as the acts were indecent and unlawful in their nature, you can convict.

Guilty, one year's imprisonment with hard labor.

Quære, as to this, in the case of a person not *sui juris*, or a child under sixteen, or a wife.—*Chamberlain*.

HOME CIRCUIT.

Hertford, March 3, 1873.

(Before Mr. Justice BRETT.)

[12 Cox's Criminal Cases, 444.]

THE QUEEN v. PORTER (!).

Murder — Manslaughter — Resisting lawful apprehension.

If a prisoner, having been lawfully apprehended by a police-constable on a criminal charge, uses violence to the constable, or to any one lawfully aiding or

(!) Reported by W. F. FINLASON, Esq., barrister-at-law.

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assisting him, which causes death, and does so with intent to inflict grievous bodily injury, he is guilty of murder: And so, if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury, it would be manslaughter.

THE prisoner was indicted for the murder of Joseph Dowfield, at Abbott's Langley.

W. A. Clark was for the prosecution.

Woollett for the prisoner.

In November last, the prisoner, with another man, named Crawley, had been drinking at a public house. The barmaid missed money from the till, and, as they were the only men in 445] *the room, suspected them, and sent for her master, the publican. He thereupon charged them on suspicion of stealing the money, and a policeman took them into custody, and handcuffed them together. They were quiet while this was being done, but as they were about to be taken off in the publican's cart, Porter, the prisoner, said he would not go, as the publican should not have four or five shillings for taking him to Hemel Hempstead (where the police-station was), and that he would rather walk. The policeman tried to put him in the cart, but he resisted, and would not go in. The other man, being pulled about in the struggle, and being hurt by the handcuffs, began to be excited, and they both became violent, struggling to get away. The policeman called upon the publican to assist him, and they threw the prisoners on the ground, and kept them down, and sent for a rope to tie them. The policeman, however, sent away the rope, saying that, if the men would go quietly, they should get up. They got up, but said they would not go in the cart, and the policeman then called on the deceased man to aid and assist in taking them away, which he accordingly was about to do. He clapped the men on the shoulders, and told them to go quietly, as it would be a great deal better for them. Porter said angrily to him "What have you to do with it?" Then he or the other man kicked him violently in the abdomen. The man at once fell backwards. The publican, the chief witness on this point, admitted that, at the time when he was before the magistrates, he was not certain which of the men gave the kick, but now he swore it was Porter, and so did the policeman, who also said "he kicked deliberately." Ultimately the men were thrown down, again Porter's legs were tied, and the two men were put into the cart together, and taken off to Hemel Hempstead. It was not supposed at the time that the man had sustained any injury from the kick, but in two or three days he died, and a *post mortem* examination showed mortification of the bowels caused by the kick.

The defense was that it was uncertain which of the men inflicted the kick, and that as it was inflicted in a scuffle, it was

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only a case of manslaughter. No point was made as to the putting on of the handcuffs being illegal ⁽¹⁾, and except as showing that it might have irritated the prisoner, it was not relied upon; and it will be observed that the deceased man was no party to it ⁽²⁾.

BRETT, J. (to the jury). The men had been given into custody of a police-constable, who had legal authority to take them into custody and to call upon others to assist him, and they had no right to resist him, and in resisting him they were doing what was illegal. He directed them distinctly that if the prisoner kicked the man, intending to inflict grievous harm, and death ensued from it, he was guilty of murder. He directed them further that if the prisoner inflicted the kick in resistance of his lawful arrest, even although he *did not intend to [446 inflict grievous injury, he was equally guilty of murder. But if, in the course of the struggle, he kicked the man, not intending to kick him, then he was only guilty of manslaughter. The questions for the jury, therefore, were whether the prisoner inflicted the kick wilfully, and intending to inflict grievous injury, or intending to resist arrest, or whether it was only accidental in the course of the scuffle. The deceased man was entitled to the same protection as the police-constable himself. If the jury believed the police-constable, the prisoner was clearly guilty of murder, for the policeman swore that he "kicked him deliberately." If he intended to kick the man, it was hardly possible but that he did it intending at all events to resist arrest. The question really came to this — whether the prisoner really intended to kick the man, for it was hardly possible that he could have intended to kick him, unless he had one or other of these criminal intents, and in either case he was guilty of murder. If, however, they thought that the kick was accidental, in the course of a wild struggle, then he would be guilty only of manslaughter.

The jury found the prisoner guilty of manslaughter.

The learned judge, in passing sentence, observed the prisoner had not resisted being handcuffed, but being removed in custody, and that his resistance certainly was illegal. ⁽³⁾

Sentence was ten years' penal servitude.

⁽¹⁾ *France v. White*, 1 M. & G.

⁽²⁾ *Et vide post.*

⁽³⁾ The point, therefore, did not arise; what would have been the case if the prisoner submitting quietly to arrest, had resisted being unnecessarily handcuffed or tied, or any other infliction of unnecessary violence or ignominy.

C A S E S
DETERMINED BY THE
COURT OF PROBATE
AND BY THE COURT FOR
DIVORCE AND MATRIMONIAL CAUSES
IN AND AFTER
MICHAELMAS TERM, XXXVI VICTORIA.

(Law Reports, 8 Probate and Divorce, 1.)

Dec. 10, 1872.

1]

*MORRITT v. DOUGLAS.

Will — Execution — Mark — Acknowledgement.

The evidence of one attesting witness (the other being dead) proved that he was called into the room of the deceased, and asked by a third party, who had the will in his hand at the time, to witness the signature of the deceased. A mark or cross was then on the paper at the foot of the will. The witnesses signed their names. The deceased was present, and within hearing, but did not make any observation, and the will was not read to or by him in the presence of the witnesses. The writer of the will, who had asked the witnesses to sign their names, was not called, and no proof was offered of his death :

Held, that the evidence failed to prove that the deceased acknowledged his signature in the presence of witnesses.

THE defendant, Mr. Douglas, propounded the will of Thomas Morritt. The plaintiff, John Morritt, pleaded that the will was not executed in accordance with the provisions of the statute, 1 Vict. c. 26, and that the deceased did not know or approve of the contents thereof. The only witness produced was Henry Parkinson, a laborer, who deposed that on the 9th of May 1862, he was sent for to Mr. Douglas's house; that he there saw the 2] deceased *Thomas Morritt, Mr. Davis, George Robinson (the other witness), and Mr. and Mrs. Douglas. George Robinson has since died. That Davis said he wanted us (me and Robinson), to sign Thomas Morritt's will. Thomas Morritt heard what was said, for he sat near all along. The paper was not before the deceased. Davis had it in his hand. Davis said it was of no use reading over the will, to which Robinson assented. Davis left the room. We called him back to show us where to sign. We signed in the presence of Thomas Morritt. Thomas Morritt did not sign in our presence, but there was a

mark on the paper. During the whole time the deceased said nothing. George Robinson asked the deceased how he was, but nothing was said about the will. I saw no signature or mark made. I do not think the deceased was exactly in his right mind. He knew what he was about. On cross examination he said he saw the mark just above the witnesses' signatures, not any other.

Nov. 21. *G. H. Cooper*, for the defendant, contended that the observation of Davis in the presence of the deceased constituted an acknowledgment by the deceased, and that as he is admitted to have been competent, it must be presumed that he knew and approved of the contents of the paper.

Searle, for the plaintiff. In all the cases where acknowledgment is presumed from indirect evidence there has been a signature, and not merely a mark, by the testator. There is no evidence before the court that the deceased ever expressed a testamentary intention in accordance with the terms of the will. He might have supposed, from what was said, that it was Davis's will that was being executed.

The cases cited were: *In the Goods of Summers* ⁽¹⁾; *In the Goods of Bosanquet* ⁽²⁾; *In the Goods of Jones* ⁽³⁾; *Middlehurst v. Johnson* ⁽⁴⁾; *Cunliffe v. Cross* ⁽⁵⁾; *Hastilow v. Stobie* ⁽⁶⁾; *Goodacre v. Smith* ⁽⁷⁾; *Cleare v. Cleare* ⁽⁸⁾; *Atter v. Atkinson* ⁽⁹⁾.

Cur. adv. vult.

*Dec. 10. SIR J. HANNEN. The issues which I had to de- [3 termine in this case were, first, whether the alleged will of Thomas Morritt, dated 9th of May, 1862, was duly executed; and, secondly, whether the deceased, at the time of the execution of the said alleged will, knew and approved of the contents thereof. The alleged will purported to be executed by the deceased by a mark. One attesting witness, Henry Parkinson, was called, who stated that upon going into the room where the deceased was, a person, named Thomas Davis, said to him and the other attesting witness that he wished them to sign Thomas Morritt's will. The witness, in answer to the question, "Did Thomas Morritt hear that?" said, "Yes, he sat close by." It is clear that the witness merely drew the inference that the deceased heard, from the fact that he was near. No other evidence was offered to connect the alleged will with the deceased. The mark, which is alleged to be that of the deceased, was already

⁽¹⁾ 2 Roberts, 295.

⁽²⁾ 2 Roberts, 577.

⁽³⁾ Deane, 3.

⁽⁴⁾ 80 L. J. Rep. (P. M. & A.), 14.

⁽⁵⁾ 8 Sw. & Tr. 37; 82 L. J. (P. M. & A.), 68.

⁽⁶⁾ Law Rep. 1 P. & M., 64.

⁽⁷⁾ Law Rep. 1 P. & M. 359.

⁽⁸⁾ Law Rep. 1 P. & M., 655.

⁽⁹⁾ Law Rep. 1 P. & M., 665.

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on the paper when the witnesses were called in; the will was not read to or by the deceased in their presence, nor was any allusion made to it by any one, beyond the words uttered by Davis; and the witness stated that he thought the deceased was not exactly in his right mind at the time. At the hearing, several cases were cited, which I have examined, but I do not think it necessary to comment on them, as they have not assisted me to come to a conclusion on the simple facts of the case. It is sufficient to say that the evidence entirely fails to satisfy the court that the deceased either acknowledged the mark to be his, or that he knew what the contents of the alleged will were.

Attorney for plaintiff: *Learoyd*.

Attorney for defendant: *T. H. Smith*.

See note 4 Eng. Rep., 680, note.

[Law Reports, 3 Probate & Divorce, 4.]

Dec. 17, 1872.

4.]

*MILLER v. JAMES and Others.

Testamentary Suit — Foreign Domicil — Probate issued under Law of Domicil and unrevoked — Pleading — Practice.

If a will of the deceased has been formally recognized and acted upon by the court of competent jurisdiction in the country of his domicil at the time of death, and remains unquestioned in that country, the Court of Probate will not allow the validity of such will to be litigated here.

AMELIA BELL, of St. Heliers, in the island of Jersey, spinster, died on the 20th of May, 1872, having executed a will dated 30th of August, 1870, in which she appointed David Miller, the plaintiff, sole executor and universal legatee. On the 30th of May, 1872, probate of this will was, by the authority of the Ecclesiastical Court of the island of Jersey, granted to the said David Miller as the sole executor therein named, the said court having competent jurisdiction, by reason that the testatrix was domiciled in the island at the time of her death. Application having been made in the Principal Registry for a grant of probate in respect of the property in this country, it was found that a caveat had been entered against such a grant by Francis James, the defendant, a nephew, and one of the next of kin of the deceased. The plaintiff thereupon filed a declaration, in which he stated that deceased at the time of her death was domiciled in the island of Jersey, that the will was duly executed in accordance with the laws of that island, and that after the death of the deceased, the Ecclesiastical Court of the island, being a court of competent jurisdiction, granted probate of the

same to the plaintiff. The pleas filed by the defendants were, 1st, that the paper writing propounded was not duly executed in manner and form as in the declaration alleged; 2d, that the deceased on the 30th of August, 1870, was not of sound mind, memory, and understanding; and 3d, that the execution of such will was obtained by the undue influence of the plaintiff.

Nov. 26. *Searle* moved the court to order that the second and third pleas be struck out. The court of competent jurisdiction *having decided that the will had been duly executed, this [5 court ought to accept such decision, and not allow the question to be re-opened here. He referred to *Enohin v. Wylie* ('); *In the Goods of Earl* (').

[SIR J. HANNEN. You contend that, although these matters were not raised before the Court of Jersey, they might be; and the proper course is to move that court to revoke the probate on the ground of these objections.]

Inderwick, for the defendants, opposed the motion.

Cur. adv. vult.

Dec. 17. SIR J. HANNEN. In this case the plaintiff, executor of the will dated the 30th of August, 1870, of Amelia Bell the deceased in the cause, in his declaration alleged that the testatrix was at her death domiciled at Jersey, that by the law of Jersey the will in question was duly executed, and is a valid will, and was proved in a court of competent jurisdiction in Jersey. The defendant has pleaded with another plea; 2, that the testatrix was not of sound mind, and 3, that the execution of the will was produced by undue influence. Application was made on behalf of the plaintiff to strike out these two pleas. I thought the question thus raised fitter to be determined on demurrer to the pleas, but as the parties desire for their guidance an expression of my opinion on the present motion, I now give it. It is the established practice that, where a will has been proved in a foreign court (and for this purpose the court in Jersey is on the same footing as a foreign court), a duly authenticated copy will be admitted to probate in this country, without further evidence of the validity of the will, as it is presumed that the foreign court has been satisfied on that point. In the case *In the Goods of Smith* (') Lord Penzance said: "It is a general rule, on which I have already acted, that when a person dies domiciled in a foreign country, and the court of that country invests anybody, no matter whom, with the right to administer the estate, this court ought to follow the grant, simply because it is the grant of a foreign court, without investigating the

(') 10 H. L. C., 1.

(') Law Rep., 1 P. & M., 450.

(') 16 W. R., 1130.

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6] grounds on which it was made, and without *reference to the principles on which grants are made in this country." And in the case of *Enohin v. Wylie* ⁽¹⁾ Lord Westbury (the lord chancellor) said: "I hold it to be now put beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the court of the country where the deceased was domiciled at his death. All questions of testacy and intestacy belong to the judge of the domicile." And again, p. 15, "The utmost confusion must arise, if, when a testator dies domiciled in one country, the courts of every other country in which he has personal property should assume the right, first of declaring who is the personal representative, and next, of interpreting the will." It was said in argument that the validity of this will might be put in issue, because it had been proved only in common form in Jersey; but it is to be borne in mind that the expressions, "in common form," and "in solemn form," are not necessarily appropriate to a foreign probate, and the court here is not entitled to take upon itself to determine whether the court of the place of domicile has adopted sufficient means to investigate the validity of wills to which it has given its official sanction. For these reasons I am of opinion that the pleas objected to must be struck out, and the defendants must seek their remedy by application to the proper court, whatever that may be, having jurisdiction to revoke the probate which has been granted.

Proctors for plaintiff: *Toller & Sons.*

Proctors for defendant: *Lawrie, Keen & Rogers.*

[Law Reports, 3 Probate and Divorce, 7.]

Dec. 17, 1872.

*GODDARD V. SMITH.

[7]

Citation to bring in Probate—Previous Caveat withdrawn before having been warned—No previous contentious Proceedings—Estoppel.

A will of the deceased having been found in which A was named executor, he gave notice thereof to B, who was about to obtain a grant in the goods of the deceased as interested under a previous will, and entered a caveat. Before the caveat had been warned, and therefore before contentious proceedings had originated therefrom, he withdrew it, and signified to B that he did not intend to seek to establish his will, and administration, with the earlier will annexed, issued to B. Subsequently A took out a citation calling upon B to bring in the administration and show cause why it should not be revoked:

Held, that A was not precluded from continuing a suit to determine which was the last will of the deceased.

WILLIAM GODDARD, late of Oldham Road, Newton Heath, Lancashire, died on the 16th of October, 1871, possessed of per-

(1) 10 H. L. C., at p. 13.

sonal estate of the value of 1,400*l.*, including a beershop and cottages at Newton Heath. On the 28th of October, 1871, administration, with a will annexed bearing date the 20th of February, 1870, of the goods of the deceased, was granted to the defendant, Joseph Smith, and Emma Molloy, two of the residuary legatees substituted in the said will. This grant was revoked on the 8th of November, 1871, on the application of Joseph Smith, and on the ground that Emma Molloy was a minor. On the 11th of November Arthur Goddard, the plaintiff, entered a caveat in the goods of the deceased, and on the 22d of November, the caveat having been warned, appeared and filed an affidavit of scripts. On the 7th of December, 1871, a letter was addressed to Mr. Ayrton, the proctor for the defendant, by Messrs. Burchett, the then proctors for the plaintiff, informing him that the plaintiff did not intend to offer any further opposition to the will of the 20th of February, 1870, and proposed that administration, with that will annexed, should be granted to Arthur Goddard and his sister, Eliza Sewrey, wife of John Sewrey, jointly with Joseph Smith. This was agreed to on the part of Joseph Smith, but the arrangement was never carried out. On the 24th of January, 1872, Mr. Goddard's attorneys, Messrs. Brown & Son, communicated to the attorneys for Mr. Smith that a will of the deceased had been *found, bearing [8 date the 2d of October, 1871, by which the deceased left the whole of his property to Arthur Goddard and Eliza Sewrey, and appointed Arthur Goddard sole executor. At the same time they entered a caveat, but before it was warned a further communication was made to the effect that Arthur Goddard did not intend to attempt to prove the will of the 2d of October, 1871, and that he was willing that administration with the will (dated the 20th of February, 1870) annexed should issue to Joseph Smith alone. The caveat entered by Arthur Goddard having been withdrawn, such administration was granted to Joseph Smith on the 12th of February, 1872. On the 30th of May, 1872, a citation issued from this court at the instance of Arthur Goddard, as executor of the will of the 2d of October, 1871, calling upon Joseph Smith to bring in the above administration, and show cause why it should not be revoked. An appearance having been entered on behalf of Joseph Smith, both parties filed affidavit of scripts, and on the 28th of June, 1872, the plaintiff filed a declaration in the ordinary form, propounding the will of the 2d of October, 1871. On the 8th of July Mr. Ayrton, on behalf of Joseph Smith, filed a petition, setting out the above facts, and alleging that by reason thereof Arthur Goddard ought not to be allowed to proceed in the suit. It prayed the court to order the contentious proceedings to be discontinued,

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and to condemn the plaintiff in the costs, or, if the proceedings were continued, to order the plaintiff to give security for costs. An answer to this petition was filed on the 6th of August, 1872, in which the relevancy of most of the facts stated in the petition was denied, and it explained that Arthur Goddard having been advised by his then solicitor that great expense would be incurred by seeking to establish the will of the 2d of October, 1871, against the opposition threatened thereto by Joseph Smith, he did unwillingly and against his own judgment consent to the caveat entered on his behalf being withdrawn. It further stated that the appearance entered on behalf of Joseph Smith on June 6th, 1872, was an absolute appearance, and that by reason thereof, as well as by his having brought in the letters of administration in obedience to such citation, and by having received the declaration delivered on behalf of Arthur Goddard, 9] the said defendant, Joseph Smith, had *debarred himself from objecting by petition to the proceedings of Arthur Goddard. That the consent of Arthur Goddard to administration with the will annexed passing in common form to Joseph Smith, is no bar or hindrance to his calling it in and citing the said Joseph Smith to show cause why it should not be revoked, the validity or invalidity of the said will of the 2d of October, 1871, never having been determined by any competent tribunal, and persons other than the said Arthur Goddard being interested under it.

Nov. 30. *Dr. Swabey* appeared for the plaintiff. He raised the preliminary objection, that inasmuch as the defendant had entered an absolute appearance to the citation, had brought in the administration sought to be revoked, and had accepted the declaration, it was too late to go into the question whether he ought to have brought in such administration. He should have appeared under protest. As there has been no litigation between the parties as to these wills—no contentious proceedings—there is no ground to discontinue the suit. He referred to *Trower v. Cox* ⁽¹⁾, *Bell v. Armstrong* ⁽²⁾, *Bailey v. Bristowe* ⁽³⁾, *Wytcherley v. Andrews* ⁽⁴⁾, and *Mitchell v. Gard* ⁽⁵⁾.

Bayford, for the defendant. The plaintiff having answered the petition, the preliminary objection fails. There have been former proceedings between these parties, in which the plaintiff, with full knowledge of all the circumstances, permitted the defendant to take a grant of administration with a will annexed in common form. He is therefore estopped from discussing the question which is the last will of the deceased. He cited *Pickard*

(1) 1 Add., 219.

(2) 1 Add., 365.

(3) 2 Roberts, 145.

(4) Law Rep., 2 P. & M., 327.

(5) 3 Sw. & Tr., 275; 32 L. J. (P. M. & A.), 129.

v. *Sears* ⁽¹⁾, *Tyerman v. Smith* ⁽²⁾, *Cairncross v. Lorimer* ⁽³⁾, *Newell v. Weeks* ⁽⁴⁾, and *Ratcliffe v. Barnes*. ⁽⁵⁾ *Cur. adv. vult.*

Dec. 17. Sir J. HANNEN. The material facts of this case are these:—The plaintiff propounds an alleged will of William *Goddard, deceased, which is dated the 2d of October, 1871, [10 by which he is appointed executor. The defendant, by petition, prays that the suit may be dismissed and the plaintiff condemned is costs, on the ground that the plaintiff, with full knowledge of the existence of the alleged will of the 2d of October, 1871, withdrew a caveat which he had entered, and permitted the defendant to obtain a grant of administration with a will, dated the 20th of February, 1870, annexed. The caveat was subducted before any appearance or warning. I am of opinion that, on these facts, the prayer of the petition cannot be granted. It was argued that the plaintiff was estopped from maintaining the suit, on the well-known principle, for which *Pickard v. Sears* ⁽¹⁾ is the leading authority, that where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. This principle, however, appears to me inapplicable to the present case. The plaintiff did not by withdrawing the caveat cause the defendant to believe in any state of facts, or to alter his position; he merely left him free to pursue his own course unopposed, namely, to take a grant in common form if he so pleased. Nor can the withdrawal of a caveat be properly likened to a discontinuance of a defense to legal proceedings. The caveat is a mere caution to the court; contentious proceedings do not begin until an appearance is entered to the warning of the caveat (rule 12) Rules and Orders, 1862; and by the previous subduction the caveator only leaves the court free to act without notice to him. Several cases were referred to as showing that under certain circumstances the court will restrain proceedings after acquiescence in the previously existing state of things. The case of *Hoffman v. Norris* ⁽⁶⁾ offers the nearest analogy, but there there was an acquiescence of seven years, and the party held to be concluded by his conduct had acted and accepted advantages on the assumption that that state of things did not exist which he afterwards sought to establish. The proceedings referred to in the petition an-

⁽¹⁾ 6 A. & E., 469.

⁽²⁾ 6 E. & B., 719; 25 L.J. (Q.B.), 359.

⁽³⁾ 3 Macq., 327.

⁽⁴⁾ 2 Phillim., 224.

⁽⁵⁾ 2 Sw. & Tr., 486; 31 L.J. (P. M. & A.), 61.

⁽⁶⁾ 2 Phillim., 230, n.

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terior to the entering the caveat are not material to the question [1] now before the court, *as they occurred before the alleged discovery of the will of the 2d of October, 1871. For these reasons I refuse the prayer of the petition.

Attorneys for plaintiff: *Paterson, Son & Garner.*

Attorney for defendant: *Ayrton.*

[Law Reports, 3 Probate and Divorce 11.]

Jan. 14, 1878.

HARTER AND SLATER V. HARTER AND OTHERS.

Will— Words introduced not in the Instructions— Omission in Probate— Parol Evidence.

Testator gave oral instructions for a will to his attorney, who made a memorandum of them in his presence. The residuary clause was as follows: "And the residue equally amongst all the sons, including the eldest son for the time being, on attaining twenty-one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms, "the trustees to stand possessed of all the residue and remainder of my real estate in trust to divide the same, etc." The draft will was left with the testator, and on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause above given. The will with such words was executed by the testator:

Held, that, however clearly an error can be established, in a will unless words have been inserted by fraud or by mistake without the knowledge of the testator, the Court of Probate cannot correct it either by the omission of words or by the insertion of other words:

THE Reverend George Gardner Harter, late of Cranfield, Bedfordshire, clerk, died on or about the 7th of February, 1872, having duly executed his last will and testament, with a codicil thereto, bearing date the 6th of June, 1862, and the 31st of August, 1863, respectively, and thereby appointed James Collier Harter, William Slater the younger, and Elizabeth Jessy Harter, executors. The plaintiffs propounded these papers in the ordinary form, but added a clause to their declaration to the following effect: "that the paper writing referred to in the affidavit of scripts filed by the plaintiffs in this cause and marked A contains (with the exception of the word 'real' which immediately precedes the word 'estate' in the residuary clause thereof) the whole of the said will of the said testator referred to in the said first count of the declaration, and that the said word 'real' was inserted in the said residuary clause of the said will by error contrary to the instructions of the said testator, and [2] was retained therein at the time of the said *execution of the said will without his knowledge or approval, and that by reason thereof the said word 'real' is not entitled to be included in the probate." The defendants, Mrs. Harter and Miss Sophia Elizabeth Jessy Harter, pleaded 1, that the will and codicil

were not executed in accordance with the requirements of the statute 1 Vict. c. 26. 2, They deny that the said word "real" immediately preceding the word "estate" in the residuary clause in the said will was inserted in the said residuary clause by error contrary to the instructions of the said testator, and that the said word "real" was retained therein at the time of the said execution of the said will without his knowledge and approval. 3, That the said will with the said word "real" immediately preceding the word "estate" in the residuary clause thereof was read over by or to the said testator, who was competent to and did understand the same, and that the said testator, at the time of the execution of the said will, knew and approved of the contents of the said will as the same now appear. 4, That the said testator, after executing his said will, duly executed a codicil thereto bearing date the 31st day of August, 1863, and propounded by the plaintiffs in this cause, and thereby confirmed and in law re-executed his said will as the same now appears. By a settlement made on the marriage of the deceased and the defendant, Mrs. Harter, in 1848, certain property was assigned to trustees for the benefit of the husband and wife during their respective lives, and on the death of the survivor in trust for the benefit of the children of the marriage in such proportion as the father and mother should jointly appoint. By an indenture, dated the 6th of September, 1855, certain freehold and copyhold hereditaments near Wakefield were limited to the use of James Collier Harter and his assigns for life with remainder to the use of George Gardner Harter (the deceased) and his assigns for life with remainder to the use of his first and other sons successively according to seniority in tail male with remainder over. On the 30th of April and 1st of May, 1862, Mr. George Gardner Harter, the deceased, called upon his solicitor, Mr. Slater, of Manchester, and gave him oral instructions to prepare a will, the particulars of which Mr. Slater wrote down at the time. The effect of the instructions was to provide for the widow by an annuity and by a *specific and pecuniary [13 bequest, and by giving her a right to occupy Cranfield Court during her life, and for the daughters by pecuniary legacies. The leasehold estate and other hereditaments in Buckinghamshire and Bedfordshire (which comprised the whole of his real estate) were to be settled on the eldest son in the same manner as the Wakefield estate by the above mentioned indenture of September, 1855, and he was to have a legacy of 20,000*l*. All the sons (including the eldest) were to share equally in the property referred to in the marriage settlement, and also in the deceased's residuary personal estate. The memorandum containing these instructions was handed to Mr. John Howarth, Mr.

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Slater's conveyancing clerk, who drew up the draft will. The instructions were fully carried out in the draft, except that the residuary clause was in the following form: "And subject to the trusts hereinbefore contained upon further trust to stand possessed of all the residue and remainder of my real estate in trust to divide the same between and amongst such of my sons now born or hereafter to be born (inclusive of my eldest son for the time being), as and when they shall severally attain twenty-one years for their own respective use and benefit absolutely."

On the 2d of May Mr. Slater handed the draft will to the testator for perusal. It was returned on the 6th of May with a letter suggesting alterations. The alterations, one of which gave a double portion in the residue to the eldest son were made, and on the 4th of June the testator, having finally approved the alterations, the will was engrossed and forwarded on the 5th of June to the testator, who returned it executed on the 7th of June. The draft was retained by the testator, but the will was deposited in Mr. Slater's office. In August, 1863, a correspondence took place between the testator and Mr. Slater as to the shares the sons took respectively in the residue of his estate.

On the 31st of August, 1863, the testator executed a codicil by which he confirmed his will. The net residue of personalty undisposed of by the will amounted to 150,000*l*. The testator left surviving him a widow, five sons, and five daughters. It was proved that Mr. Howarth did not communicate with the testator, but prepared the draft from Mr Slater's memorandum. He could have had no doubt that the word "residue" in the [14] memorandum included real *and personal estate, but by accident the words "and personal" were omitted in the draft. When the testator executed the codicil he had no other paper before him.

Nov. 29. *Dr. Spinks*, Q.C. and *Dr. Tristram*, appeared for the plaintiffs. This court has power to correct a mistake in a will, whether it arises from error or from fraud. It used to have such a power before the passing of the Wills Act, and has so still, for it has not been taken away by that statute. Before the act the court would carry out the intentions of a deceased, providing they were reduced into writing in his lifetime. The instructions in this case, which were in writing, dispose of the personal residue only and the terms of the residuary clause show that it was not intended to apply to realty. Although this court may not be able to introduce the words "and personal," it may expunge the word "real." They referred to *Fawcett v. Jones* ⁽¹⁾; *Bridge v. Arnold* ⁽²⁾; *Barton v.*

⁽¹⁾ 3 Phillim., 434.

⁽²⁾ 2 Phillim., 455.

Robins (1); *Damer v. Pechell* (2); *Gerrard v. Gerrard* (3); *Micklin v. Franklin* (4); *Lord St. Helens v. Marchioness of Exeter* (5); *Travers v. Miller* (6); *Bayldon v. Bayldon* (7); *Draper v. Hitch* (8); *Castell v. Tagg* (9); *Uppill v. Marshall* (10); *Allen v. M'Pherson* (11); *In the Goods of Duane* (12); *Lister v. Smith* (13); *Reffell v. Reffell* (14); *Charter v. Charter* (15); *Guardhouse v. Blackburn* (16); 1 Wms. Exors. (6th ed.) 343.

Inderwick and *Mellor* appeared for the respective defendants. They contended that the Court of Probate has no power to amend an error simply as such, whether the error appears on parol or by a written document. There is no ambiguity on the face of the paper, and, therefore, there is no opening for parol evidence. The Wills Act enacts that a will to be valid must be executed in a *particular manner, and that only is the [15 will which has been executed in that manner. Even if the court could have corrected the will as it originally stood, it could not do so after the execution of the codicil which confirmed the will. They referred to *Rockell v. Youde* (17); *Shadbolt v. Waugh* (18); *In the Goods of Wilson* (19); *Mitchell v. Gard* (20); *Birks v. Birks* (21); *Drake v. Drake* (22); *Stanley v. Stanley* (23); *Atter v. Atkinson* (24).
Cur. adv. vult.

Jan. 14, 1873. SIR J. HANNEN. In this case the plaintiffs, two of the executors of the will of the Rev. George Gardner Harter, deceased, dated the 6th of June, 1862, propound the said will, together with a codicil thereto of the 31st of August, 1863, and in their declaration allege that the word "real," which immediately precedes the word "estate" in the residuary clause of the will was inserted in the said residuary clause by error, contrary to the instructions of the testator, and was retained therein at the time of the execution of the will, without his knowledge or approval, and that by reason thereof the said word "real" is not entitled to be included in the probate. One of the defendants, Elizabeth Jessy Harter, the widow and remaining executrix of the will has pleaded denying that the word

(1) 2 Phillim., 455, n.

(2) 2 Phillim., 458.

(3) 2 Phillim., 459.

(4) 2 Phillim., 461.

(5) 2 Phillim., 461, n.

(6) 3 Add., 226.

(7) 3 Add., 282.

(8) 1 Hagg. Eccl., 674.

(9) 1 Curt., 298.

(10) 3 Curt., 636.

(11) 1 H. L. C., 191.

(12) 2 Sw. & Tr., 590.

(13) 3 Sw. & Tr., 282; 32 L. J. (P. M. & A.), 13.

(14) Law Rep., 1 P. & M., 139.

(15) Law Rep., 2 P. & M., 315.

(16) Law Rep., 1 P. & M., 109.

(17) 3 Phillim., 141.

(18) 3 Hagg. Eccl., 570.

(19) 2 Curt., 853.

(20) 3 Sw. & Tr., 275; 32 L. J. (P. M. & A.), 129.

(21) 4 Sw. & Tr., 23; 34 L. J. (P. & M.), 90.

(22) 8 H. L. C., 172; 29 L. J. (Ch.), 556.

(23) 2 J. & H., 491.

(24) Law Rep., 1 P. & M., 665.

"real" was inserted in the residuary clause by error, contrary to the instructions of the deceased, and that the said word "real" was retained therein without the testator's knowledge and approval, and a further plea that the will with the word "real" in the residuary clause was read over by and to the said testator, who was competent to, and did, understand the same; that the testator at the time of the execution of the said will knew and approved of the contents thereof as the same now appear; and, lastly, that the testator, after executing this said will, duly executed the codicil thereto, dated the 31st of August, 1863, and thereby confirmed, and, in law, re-executed his said will as the same now appears. These portions of the pleadings are sufficient to show the questions which arise for decision in the cause. By the settlement executed on the marriage of the deceased, he had, with his wife, a joint power of appointment of moneys, amounting on the whole to 65,000*l.*, for the benefit of one or more of his children. By a subsequent settlement certain freehold and copyhold hereditaments in the county of York stood at the time of the execution of the will in question limited to the use of the deceased and his assigns for life, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with divers remainders over. The deceased was also possessed of real estate of considerable value, and of personalty of the value of about 200,000*l.* In this state of things, the deceased, on the 1st of May, 1862, after full explanation from his solicitor, Mr. Slater, of the position of affairs in reference to the said settlements, gave him oral instructions for the preparation of his will. Mr. Slater, in the presence of the deceased, wrote a memorandum of these oral instructions. The deceased also instructed him to prepare a joint appointment under the power in that behalf in the marriage settlement, and this was, as stated by Mr. Slater, part of the scheme the testator wished to be carried out in connection with his will. The memorandum of the instructions for the will is before the court, and is as follows: "Give to wife, Elizabeth Jessy Hall, provisions, wines, liquors, carriages, horses, harness, live and dead stock in and about my dwelling house and farm at Cranfield, except plate and furniture, with 1000*l.* legacy to wife absolutely. Set apart a sum sufficient to raise an annuity of 2000*l.* per annum to Mrs. Harter for life, with powers of investment. Give to Mrs. Harter the privilege of occupying, rent free, the house, outbuildings, garden, and pleasure grounds at Cranfield Court, until eldest son for the time being shall attain twenty-five years of age, provided she so long remains my widow; and during such occupation of the house Mrs. Harter to have the use of the plate and furniture without

liability to loss or breakage. Limit (subject to interest in Cranfield Court given to Mrs. Harter) the Cranfield and other estates in Bedfordshire or Buckinghamshire, including the avowson of Cranfield, and the plate to like limitations as the Yorkshire estate, subject to previous trusts. Give furniture at Cranfield Court to eldest son for the time being on attaining twenty-five. Also give him 20,000*l.* on attaining *twenty-one. Give legacy [17 of 10,000*l.* to each of my daughters, Sophia Elizabeth Jessie H., and Eleanor Maude H., on twenty-one or marriage. And the residue equally among all the sons, including the eldest for the time being, on attaining twenty-one. Maintenance, education, and advancement clauses during minority, as usual. Trustees and executors, my wife and my brother, James Collier Harter." Mr. Slater subsequently handed this memorandum to his managing clerk, Mr. Howarth, who drew up a draft will. In this draft the residuary clause is drawn in the following words: "And subject to the interests hereinbefore contained, upon further trust to stand possessed of all the residue and remainder of my real estate, in trust to divide the same equally between and amongst such of my sons now born or hereafter to be born (inclusive of my eldest son for the time being), as and when they shall severally attain their respective ages of twenty-one years, for their own use and benefit absolutely." A joint appointment providing for the equal division of the funds settled by the marriage settlement was also drawn up. On the 2d of May Mr. Slater handed to the deceased a fair copy of the draft for his perusal; and on the same day the draft of the joint appointment was also furnished to the deceased. On the 6th of May the deceased returned to Mr. Slater the draft will, as to which, after stating that he had carefully perused it, he suggested certain alterations. These were afterwards embodied in the draft in red ink, and the draft, so altered, was again returned to the deceased. Between this time, the 9th of May, and the execution of the will on the 6th of June, several letters passed between the deceased and Mr. Slater on the subject of the will, which clearly show that the deceased read and fully considered the will, and suggested an alteration in the residuary clause, by which the eldest son was to take a share equal to two of his brothers' shares; but no reference is made in the correspondence to the terms in which the residuary clause was worded, and it remained, with the exception of the above mentioned alteration, as drawn in the first draft, and was so copied into the will, which was ultimately executed. Mr. Howarth, the managing clerk to Mr. Slater, was called as a witness, and stated that he understood the word "residue" in the instruction, to mean "real and personal," but that by inadvertence he drew it as it

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[18] now stands, and never *noticed the error. Mr. Slater also stated that the terms of the residuary clause entirely escaped his attention. Upon the evidence afforded by the documents in the cause as well as by the oral testimony of the witnesses, I entertain no doubt that the residuary clause, as it stands in the will, does not express the real meaning of the testator. It was not his intention that there should be an intestacy as to his residuary personalty, but that he intended that such residue should be divided amongst his sons, the eldest taking two shares. It is necessary that I should state what appears to me to have been the exact nature of the error by which a failure to express the true intention of the testator has arisen. I think that the error consists in the omission of the words "and personal" after the word "real" in the residuary clause. The memorandum of instructions drawn up by Mr. Slater, deals with realty as well as personalty, and then proceeds to dispose of the residue. This, without qualification, would mean the residue of the testator's property generally, real and personal; and so it was understood by Mr. Howarth, who drew the will. It makes no difference in my judgment, that the testator had not at the time any other realty than that which he had specifically disposed of. That fact may possibly have made him or Mr. Slater careless in the use of a general term wide enough to include realty, if it had existed, but it does not negative an intention on their part to use the word in its ordinary and more extended sense. There was no intention on the part of the testator to leave an intestacy as to any other real estate which he might possess or acquire, but in the belief that he had not and probably would not have any, he was content to use language wide enough to include it. Nor does the fact that the language of the residuary clause in disposing of the residue is rather applicable to personalty, make any difference. On this point the observations of Lord Cottenham in *Saumarez v. Saumarez* (1) may be referred to. "The circumstances of the testator using expressions and giving directions applicable only to the personal estate, may prove that he did not at the time consider, or was not aware, that realty would be part of his residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the [19] *operation of the general intent of passing all the residue of his property;" and again, at page 339, "In considering gifts of residue, whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed such gifts may be introduced to guard against a testator having overlooked some pro-

(1) 4 M. & Cr., at page 340.

perty or interest in the gifts particularly described." This view of the facts leads me to a conclusion which is decisive of the case. I think it is not in the power of the court to supply words accidentally omitted from a will. The Wills Act (1 Vict. c. 26, s. 9) admits of no qualification. "No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned," that is, by a duly attested signature. In the present case there is no testamentary disposition of the residue of the personalty of the deceased fulfilling the requirements of the act, and the intention of the deceased, however clearly it may appear in the unattested instructions, cannot be given effect to. "With respect to wills made on or after January, 1838," says Sir E. V. Williams (*), "it is plain that by reason of the provisions of the statute 1 Vict. c. 26, the whole of every testamentary disposition must be in writing and attested pursuant to the act. Whence it follows that the court has no power to correct omissions or mistakes by reference to the instructions in any case to which that statute extends." This disposes of the numerous cases, which were cited in argument, of dates anterior to 1 Vict. c. 26; and with regard to wills to which that statute is applicable, it has not been suggested that the court can admit to probate any words not contained in some duly attested testamentary document, however cogent the evidence may be, from oral or written instructions, that they were intended to be part of the will. But it was contended on behalf of the plaintiffs that the true view of the nature of the mistake in the draft and copy as executed is not that the words "and personal" were omitted, but that the word "real" was inserted, and that the will ought to be made to read "all the residue and remainder of my estate." I have already stated my grounds for holding that the error was one of omission, but there are further special reasons why I cannot expunge the word "real" from the residuary clause. There are *undoubtedly nu- [20
merous cases which establish that this court may decree probate of a part only of a properly attested instrument purporting to be a will. It is not necessary to do more than refer to the authorities collected in the case of *Fawcett v. Jones* (†) which, though relating to wills before the statute 1 Vict. c. 26, are on this head applicable to wills of a later date. And in the case of *Allen v. McPherson* (‡), Lord Lyndhurst said, "It is perfectly clear that the Ecclesiastical Court may admit part of an instrument to probate, and refuse it as to the rest." Lord Campbell (§) in the same case says, "it is quite clear that the Ecclesiastical Court had jurisdiction to refuse probate of that part of the codicil

(*) 1 Wm. Exors. (1st ed.), 345.

(†) 3 Phillim., 434.

(‡) 1 H. L. C., at p. 209.

(§) 1 H. L. C., at p. 233.

which affects the appellant, because, giving credit to the facts stated, that part of the codicil was not the will of the testator; he was imposed upon, and probate of that part of the codicil ought to have been refused." In that case fraud was the ground on which it was sought to expunge a part of a codicil; but *In the goods of Duane* ⁽¹⁾ Sir C. Creswell applied the same reasoning to a case of simple mistake. There the words which were rejected were part of a printed form, and ought to have been struck out as inconsistent with the instructions given by the testator; they were not read by or to the testator, but the person who prepared the will omitted to strike them out. Sir C. Creswell, after referring to *Allen v. McPherson*, said: "I can see no difference in principle between that case and the present one, where a clause for which the deceased gave no instructions, and which was not read over to him, formed *per incuriam* part of the document signed by the deceased." The facts of that case distinguish it in an essential manner from the present. There an entire clause of which the testator was altogether ignorant was introduced by accident, and it was contrary to the intention of the person who drew the will that the clause should be in it. In the present case the testator intended that a clause disposing of the residue of his personalty should be in the will, but he left it to another person to choose the language by which his intention should be carried into effect, and he read and adopted as his own the language so chosen. Inappropriate language having been used, the court is asked to remedy the mistake, 21] not by rejecting *words of which the testator is proved to have been ignorant, but by modifying the language used by the draftsman, and adopted by the testator, so as to make it express the supposed intention of the testator. This is, in fact, to make a new will. The theory of the plaintiffs, is that the testator had his personalty only in his mind, when he gave instructions for the residuary clause, because he had no realty undisposed of. If so, the proper mode of carrying out the instructions would have been to say, "the residue of my personal estate;" and in that case the error consists in having substituted the word "real" for "personal." Upon this hypothesis the court is asked to strike out the word "real," not because the clause would then be in the form the testator intended, but because it would in its transformed shape substantially carry out the testator's wish. It is also to be observed, that not only the form, but probably the effect would be different; for a bequest of the residue of the testator's estate would, according to the modern decisions, include the realty, unless the context clearly excluded it: *Jarm. on Wills*, ch. 22: *The Mayor and Corporation of Ham-*

(1) 2 Sw. & Tr., 590.

ilton v. Hodsdon ⁽¹⁾. Such a mode of dealing with wills would lead to the most dangerous consequences; for it would convert the Court of Probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator. In very many of the cases which come before the courts of law and equity, as to the proper construction of wills, the intention of the deceased is supposed to be seen, but the question is whether the language used expresses the intention. If the process now sought to be applied to this will were to be adopted, the Court of Probate will in future be asked, first to ascertain by extrinsic evidence what the testator's intention was, and then to expunge such words or phrases, as, being removed, will leave a residuum, carrying out the intention of the testator in the particular case, though different in form, and possibly in legal effect, from that which the testator or his advisers intended. If I felt myself at liberty to adopt such a course, I should think that the best amendment of the will would be to leave the word "residue" by itself in the residuary clause as it is in the memorandum of instructions. But it is obvious that, though this might *give [22 effect to the testator's wishes in this instance, it would be by an accident; for the word "residue," taken with the context of the will, might have had a different effect to that which it has in connection with the context of the instructions; but, for the reasons I have given, I entirely repudiate this mode of altering the language of a testamentary instrument, and I am, therefore, of opinion that whether the error which has undoubtedly crept into the will be one of omission or insertion, it is equally beyond the jurisdiction of this court to correct it. I have thus far considered the case, apart from the decision of Lord Penzance in *Guardhouse v. Blackburn* ⁽²⁾, but I must add that it appears to me that that is an authority directly decisive of this case in favor of the defendants. It was there established to the satisfaction of the court that specific words had been inserted by the attorney who drew the codicil by mistake, and without instructions. Yet the learned judge held that as the contents of the codicil had been brought to the knowledge of a competent testatrix, the execution of the instrument must be deemed conclusive evidence that she approved as well as knew the contents. If I did not agree in the reasons given by Lord Penzance for his decision, it would be my duty to follow it in a similar case; but I must add, that I entirely adopt my predecessor's very lucid exposition of the rules by which this court ought to be governed with reference to the rejection of the whole or part of a duly executed testamentary document. The conclusion I have arrived

⁽¹⁾ 6 Moore, P. C., 76.⁽²⁾ Law Rep. 1 P. & M., 109.

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at makes it unnecessary that I should express a positive opinion on the effect which the execution of the codicil would have had on the will, if I had thought that the word "real" ought to be expunged from the residuary clause, but I am strongly inclined to think that it would have made no difference, and that the codicil must be held to confirm only that which was the true will of the testator. For these reasons I pronounce for the will in its present form.

Attorneys for plaintiffs: *Milne, Riddle & Mellor.*

Attorneys for defendants: *R. M. & F. Lowe.*

[Law Reports, 3 Probate and Divorce, 23.]

Jan. 14, 1873.

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*ORTON V. SMITH.

Costs out of Estate — Unsuccessful Opposition to Will — Pleas of Undue Influence and Fraud.

The Court allowed costs out of the estate to the unsuccessful opponent of a will although he had pleaded undue influence and fraud, being of opinion that the mode in which the testator had executed the will and the conduct of the persons beneficially interested under it had reasonably excited doubt and suspicion, and justified those pleas.

THE plaintiff propounded, as executor, the will, dated the 23d of May, 1872, of Isaiah Smith, late of Foleshill, in Warwickshire, tanner and farmer, who died in June, 1872. By the will, the testator gave legacies of 50*l.* each to a brother and sister, and the rest of his property to Mr. and Mrs. King, with whom he had been living for some years before his death. The defendants, who were the next of kin, opposed the will, alleging incapacity, undue influence, and fraud. The cause was tried on the 11th, 12th, and 17th of December, 1872, before Sir J. Hannen, without a jury. The plaintiff, who was the medical attendant of the deceased, gave positive evidence as to the testator's capacity and as to his having given instructions for the will; but he was not present when the will was executed. The Kings and other witnesses were also examined. The defendants' case was that the testator's signature to the will was a forgery, and Mr. Chabot, the expert, was examined, and gave a decided opinion to that effect. The trial was adjourned in order that the plaintiff might submit the signature to another expert, but the opinion of that expert was also against the genuineness of the signature, and he was not called. The court, being unable to see any ground for coming to the conclusion that the evidence of the plaintiff was untrue, and also relying on the evidence of a solicitor's clerk who was in the testator's

house when the will was executed, although not in the room, and being unable, on a comparison of handwriting, to concur in the opinion of Mr. Chabot, pronounced for the will; but allowed the defendants' costs out of the estate after payment of the plaintiff's costs.

A. Slaveley Hill, Q.C., and *Bayford*, for the plaintiff, were *afterwards heard on the question of costs. The property [24 is very small, and it is doubtful whether there will be sufficient to pay the plaintiff's costs and the legacies. The defendants having taken upon themselves to establish a case of undue influence and fraud, and having failed, ought to be condemned in costs. Even if there was reasonable ground for contesting the will and raising those issues, that would not entitle them to costs out of the estate, but would merely protect them against condemnation in costs.

Dr. Spinks, Q. C., and *Searle*, were for the defendants.

SIR J. HANNEN. I gave my most anxious attention to this question of costs, and I remain of the same opinion as before respecting it. The case was a peculiar one. An apparently respectable man, against whom nothing came out in the course of the trial which justifies me in saying that I would not believe him — I mean Mr. Orton — gave evidence, which, if true, proved that he had himself received instructions for the will from the testator, and that the will was drawn up in accordance with those instructions by an attorney against whom also nothing appeared tending to show that he was not trustworthy. There was also no doubt, on the evidence of that attorney's clerk, that the will was taken up to the testator's room, and was brought down again duly executed. Some witnesses further spoke to declarations of the testator referring to the execution of the will. What appeared on the other side? There was the evidence of a gentleman, for whose judgment I have a great respect, Mr. Chabot. I have frequently had occasion to observe the value of that gentleman's evidence, but in this case his evidence, that he did not think the signature to the will was genuine, was founded upon a single signature, and, for the most part, upon a single letter. If I had acted on his evidence I should, in effect, have convicted three persons at least of fraud and forgery. I came to the conclusion that, the evidence of those witnesses being unimpeached, I could not, on the theoretical evidence of Mr. Chabot alone, refuse credence to their statements. But in dealing with the question of costs, I have to consider all the facts of the case. I understand the rule as to costs to be that if the circumstances are such as to justify the litigation, then this court, going farther than other courts, is in *the habit of allowing the party who has entered into a liti- [25

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gation which it considers reasonable and justifiable to have his costs out of the estate. Undoubtedly it frequently refuses such an indulgence where the plea of fraud is improperly pleaded, but the question whether such a plea was justifiable must be judged upon its merits in each case that comes before the court. Now, in this case, there were many facts calculated to excite grave suspicion. There was the fact that Mrs. King, having got the will executed, never mentioned it to the members of the family of the testator who soon afterwards came to the house. That was conduct which led to doubt and suspicion. More than that, there was the very remarkable fact, the true explanation of which remained in obscurity to the last, that after the execution of the will Mrs. King got a neighbor to write the testator's signature on two checks instead of obtaining the testator's own signature to them. Although that circumstance did not go directly to the merits of the case, it was certainly calculated to excite grave suspicion, and the reason why the checks were signed by some one other than the testator remained to the last in confusion and obscurity. One of the grounds on which the court always allows costs out of the estate is that the testator has left his testamentary papers in such a state that they excite suspicion and invite litigation. Assuming that I was right in the conclusion to which I came on the merits, it was a misfortune that the mode in which the testator executed the will certainly gave rise to the most natural and well founded suspicion, for the signature was evidently patched and altered. I could not come to the conclusion that the signature was a forgery. I could not believe that the ignorant people who were about the testator when the will was executed were prepared with the means of obliterating a part of the signature. If they were not, it must be asserted that the attorney or Mr. Orton must have used some means of obliteration; but this was not proved. It was a very great misfortune that the testator executed the will in such a manner as to give rise to very serious suspicions. These are the grounds on which I thought the defendants' costs should be paid out of the estate after a full indemnity had been given to the successful party for his costs. I very much regret that the value of the estate is so small as to 26] make this probably a *barren victory for the Kings, but I must not allow that consideration to influence me in determining the question whether or not this was a reasonable and proper litigation.

Solicitors for plaintiff: *Sharp & Co.*

Solicitor for defendant: *W. Tindal Perkins.*

[Law Reports, 8 Probate and Divorce, 26.]

Jan. 21, 1873.

IN THE GOODS OF SYKES.

Will — Appointment of Executor on an Erasure — Declaration of Testator — Subsequent Codicil.

The deceased executed a will and codicil, the latter referring to the former by its date. The name of the executor appointed by the will was written on an erasure. The court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor.

WILLIAM HENRY SYKES, of Albion Street, Hyde Park, Middlesex, died on the 16th of June, 1872, having executed a will, dated the 9th of November, 1869, and a codicil, dated the 10th of August, 1870; the latter referred to the will by its date. Some time in 1871, the testator deposited a sealed packet with Major General Sir George Balfour, which remained in his custody until after the death of the deceased. It was then opened, and found to contain the will and codicil. In the will Dr. John Scott was appointed executor, but his name was written upon an erasure. There was no evidence to show when such name had been written; but Major General Sir George Balfour, in his affidavit, stated that the testator informed him, fully two years before he deposited the sealed packet in his custody, that Dr. John Scott was one of his executors.

Jan. 14. *Dr. Tristram* moved for probate of the will and codicil to be granted to Dr. Scott, as the executor named in the will. The court must be satisfied, from the affidavit of Major General Balfour, that the name of Dr. Scott was written in the will before the execution of the codicil, which republishes the will in its then state. He referred to *Swete v. Pidsley* ⁽¹⁾.

Cur. adv. vult.

*Jan. 21. SIR J. HANNEN. This is a question as to an [27 alteration in the will of the deceased. Was it made before or after the execution of the will, or before or after the execution of a subsequent codicil? The will is dated the 9th of November, 1869, and the appointment of Dr. Scott as executor is written on an erasure. The question arises, whether this alteration is effectual. In the absence of evidence there is, in general, a presumption that all alterations made in a will were made after its execution. The authority for this is *Cooper v. Bockett* ⁽²⁾. But the rule is somewhat differently expressed by the late lord chancellor, then Sir W. P. Wood, in *Williams v. Ashton* ⁽³⁾. He

⁽¹⁾ 6 No. of Ca., 189.⁽²⁾ 4 Moo. P. C., 419.⁽³⁾ 1 J. & H., 115.

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there said, "I do not think that it is quite a correct mode of stating the rule of law to say that alterations in a will are presumed to have been made at one time or another. The correct view is that the *onus* is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed. I do not consider that the court is bound to say that it will presume such alterations to have been made, either before or after execution. With regard to a will, I do not see any necessary presumption of the kind." The *onus*, therefore, lies on those who assert the alteration to show that it was made before the execution of the will. Stated, however, as the rule generally is, that there is a presumption that alterations on the face of a will were made after its execution, this presumption may be rebutted by evidence of declarations made before and not after the execution: *Doe & Shallcross v. Palmer* ⁽¹⁾. There the evidence was of declarations of an intention of the testator, which appeared to have been carried into effect by the will as altered, and not as it originally stood. In that case, as well as in *Williams v. Ashton* ⁽²⁾, the court dealt with the alterations on the will itself, and without any question as to the effect of the execution of a subsequent codicil. Now a codicil is the republication of a will, and usually the presumption remains the same as regards the codicil as the will; so that it will be presumed, without any evidence to the contrary, that alterations appearing on the face of the will were made not 28] *only after the execution of the will, but also of the codicil: *Lushington v. Onslow* ⁽³⁾. It would appear, however, that as the declarations of a testator, made before the execution of a will, are admissible to show that alterations were made before such execution, so declarations made before the execution of a codicil, which republishes the will, may be admitted to show that the alterations in the will were made before the execution of the codicil. In the present case the affidavit of Major General Sir George Balfour states, that on an occasion before the execution of the codicil the testator told him that he had appointed Dr. Scott his executor. This is a much more positive and stronger declaration than that made in *Doe & Shallcross v. Palmer* ⁽¹⁾, because it might be said that a statement by a man that he intends to make a bequest to a certain individual, leaves open the question whether the corrections, to carry out such intention, were made after the execution of the will, the document as originally executed having failed to do so. In this case the declaration is as to an act already done, and can only be correct if it be as-

(1) 16 Q.B., 747; 20 L. J. (Q.B.), 367.

(2) 1 J. & H., 115.

(3) 6 No. of Ca., 183.

sumed that the appointment had been then made. The execution of the codicil was the confirmation of the will in its altered state, with the appointment of Dr. Scott on it. I decree probate to him.

Attorney: *B. F. Watson.*

[Law Reports, 3 Probate and Divorce, 28.]

Jan. 21, 1873.

DAVIES v. GREGORY and Others.

Costs out of Estate — Unsuccessful Opposition to Will.

The costs of an unsuccessful opposition to a will must be paid out of the estate in cases where the testator, by his own conduct, and habits, and mode of life, has given the opponents of the will reasonable ground for questioning his testamentary capacity.

In cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a *bonâ fide* belief in the existence of a state of things which, if it did exist, would justify the litigation, and the opposition is unsuccessful, each party must pay his own costs.

THOMAS HOLME, late of the City Road, London, died in May 1872, leaving a will dated the 30th of April, 1870, which was propounded by the defendants as executors. The plaintiff was [29 the sister and next of kin of the testator, and the validity of the will was constested by her and by the executors of a deceased sister (cited to see proceedings) on the ground that the testator was not of sound mind at the time of its execution. The testator was possessed of personal property amounting to about 90,000*l.*, and by the will he distributed the whole of that property (with the exception of legacies of 500*l.* to each of the executors, 100*l.* to Mrs. Taylor, one of his sisters, since deceased, and 100*l.* to a friend) amongst various hospitals, and other charitable and religious societies. He directed that one half of the residue (if any) should be given to the Stationers' Company, of which he was a member, and that the other half should be divided between the two executors, Mr. Gregory and Mr. Francis. Mr. Gregory was a retired upholsterer and undertaker, who had buried the testator's father and mother, and with whom he had kept up a slight acquaintance, and Mr. Francis was the solicitor who prepared the will. The cause was tried before Sir J. Hannen, without a jury on the 19th, 20th, 21st, and 23d of December, 1872, and on the 11th of January, 1873.

Sir J. Karlake, Q.C., Dr. Spinks, Q.C., and Searle were for the executors propounding the will; Dr. Swabey for the Stationers' Company; and Pritchard for some of the charities; Dr.

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Deane, Q.C., Parry, Serj't., and *Dr. Tristram* for the next of kin; and *Inderwick* for the executors of the deceased's next of kin. On the 15th of January, 1873, Sir J. Hannen delivered judgment, and pronounced for the will.

Dr. Spinks moved that the next of kin might be condemned in costs. There was no reasonable ground for contesting the will on the ground of incapacity. But if there were reasonable ground for an inquiry into the testator's capacity, that would only relieve the next of kin from condemnation in costs, and would not entitle her to costs out of the estate. The costs of an unsuccessful opposition were never allowed out of the estate except in cases where the executors or residuary legatees had by their own conduct given cause to suspect the validity of the will, 30] and where the *litigation was caused by the condition in which the deceased had left his testamentary papers. In the present case no blame was imputed to the executors, and the testator had taken every possible precaution against future litigation in the preparation and execution of the will, and his testamentary papers were in perfect order.

Parry, Serj't., for the next of kin, moved that the costs of the opposition might be allowed out of the estate. The sister of the testator who contested the will, had not seen him, or held any communication with him for many years before his death, and when the evidence of the witnesses who had been examined in opposition to the will was brought to her knowledge, she was bound to insist on an investigation into his state of mind. She had no means of ascertaining whether that evidence was true or false. The court had come to the conclusion that it was to some extent true, but that there was a great deal of exaggeration in the statements of many of the witnesses. If the evidence of those witnesses as it was laid before her had been accepted by the court, the testator's incapacity would have been established; and considering that so large a property was left to charities, and that the residuary legatees were persons who had little acquaintance with the testator, and no claim upon his bounty, the next of kin were quite justified in taking the opinion of the court upon that evidence. The cases of *Frere v. Pencock* ⁽¹⁾, *Mitchell v. Gard* ⁽²⁾, and *Summerell v. Clements* ⁽³⁾ were cited.

Cur. adv. vull.

Jan. 21. SIR J. HANNEN. I have been called upon to give my opinion on the question, whether the costs of this litigation should be borne by the parties who unsuccessfully opposed pro-

⁽¹⁾ 1 Robert, 442.

⁽²⁾ 3 Sw. & Tr., 275; 33 L. J. (P. M. & A.), 7.

⁽³⁾ 3 Sw. & Tr. 35; 32 L. J. (P. M. & A.), 33; and cases collected in 32 L. J. (P. M. & A.), 33, note 2.

bate of the will, or whether each party should pay their own costs, or whether the costs of the opposition should be paid out of the estate. I thought it necessary to take time to consider the principles which ought to guide me in dealing with the question of costs, not only in this but in other testamentary cases. It was contended by Dr. Spinks, for the executors, that the general rule *was that costs should be allowed out of [31] the estate only in cases where the state in which the deceased left his papers had given rise to the litigation. It was admitted that there were some exceptions, but that was said to be the general rule. No doubt there was an unwillingness on the part of the court formerly having jurisdiction in testamentary causes to grant costs out of the estate. The first infringement of the general rule that the unsuccessful party should pay costs was in cases where the testator had left his papers in confusion. But it is plain that if the question be asked, why should costs be paid out of the estate in such cases, the answer must be, because the conduct of the testator himself caused the litigation. That principle having once been extracted from the decisions, we should no longer slavishly confine ourselves to precisely the same state of facts in applying it, but should apply it to all cases to which it is fairly applicable. The principle being as I have stated, the question to be determined in each case is this : Is the testator, by reason of his conduct, to be considered the cause of the reasonable litigation which has occurred after his death as to the validity of his will? There are many cases in which it has been held that where reasonable doubts existed as to the testator's testamentary capacity the costs might be given out of the estate. *Frere v. Peacock* ⁽¹⁾ is an illustration of this rule, although the facts were by no means the same as those of the present case. In many other cases, which I need not refer to, the costs have been decreed to be paid out of the estate. I have also been referred to a case in Ireland, in which the same rule in its larger sense was laid down : *Fairtlough v. Fairtlough* ⁽²⁾. That case is well deserving the attention of all whose duty it may be to deal with the difficult subject of mental competency, for it illustrates in a remarkable manner the complex nature of the human mind and brain. The testator, in consequence of an attack of paralysis, whilst retaining perfect possession of his intellectual powers, lost all power of spontaneously summoning up the correct name or expression corresponding with the idea existing in his mind. This peculiar form of mental ailment is not uncommon, for I have known two exactly similar cases within the range of my own experience. It shows that the machinery of the human mind may *as to a part of it be [32]

⁽¹⁾ 1 Robert., 442.⁽²⁾ Milward, 36.

thrown out of gear, leaving the intellect substantially intact, just as a clock may keep time correctly, although the striking apparatus may be disordered. Dr. Radcliff in commenting on that case says: "The principle of awarding costs out of the fund in testamentary cases is not confined merely to cases where the question arises upon the state in which the deceased has left his testamentary papers. The rule should be taken in a wider view, and, wherever it is proper to specially bring the matter before the court for its opinion, the costs may be given out of the estate. The passage in Williams' Law of Executors (pt. I. bk. IV. c. ii. s. vii.) refers merely to cases where the question submitted to the court arose from the state of the deceased's testamentary papers, but does not say that such is the only case on which the costs can be so awarded; that is but one of the special cases where the court will direct the costs to be paid out of the estate, and is not applicable to the present case. The case of *Ross v. Chester* (¹), extends the principle. There was no question arising in that case from the state of the papers, but the will being made in *articulo mortis*, the court considered that the next of kin were fully justified in entering into the investigation, and were entitled to their costs. *Fulleck v. Allinson* (²), was a case of monomania. The will left all the property in charity. The monomania did not affect the will, nor was it proved clearly to have existed at the time of its execution; yet Sir J. Nichol intimated no doubt of his authority to give, and gave, the costs to the next of kin out of the fund. It was argued here by Dr. Hamilton that the executor in that case consented; it was not so, he was a nude executor, and could not consent, and the consent of the party could not give jurisdiction. Sir J. Nichol expressed himself as disinclined, on account of the great bulk of evidence introduced, to allow the costs out of the estate, but did so under the very peculiar circumstances of the case. In this case it was quite proper and necessary that the opinion of the court should have been taken. . . . Under all the circumstances I shall allow the impugnant his costs out of the estate, but shall direct them to be taxed as between party and party." That being the principle on which this question 33] of costs out of the estate ought to be dealt with, the next branch of the inquiry is under what circumstances ought each party to pay his own costs? Where the facts show that neither the testator nor the persons interested in the residue have been to blame, but where the opponents of the will have been led reasonably to the *bonâ fide* belief that there was good ground for impeaching the will, there will be no order as to costs. Of course the opponents must have taken all proper steps to inform

(¹) 1 Hagg. Eccl., 235.

(²) 3 Hagg. Eccl., 527, 547.

themselves as to the facts of the case, but if, having done so, they *bonâ fide* believe in the existence of a state of things which, if it did exist, would justify litigation, then, although no blame should attach to the testator or to the executors and persons interested in the residue, each party must bear his own costs.

I now have to consider under which head I ought to rank the present case, and I have come to the conclusion that it must be ranked under the first head. I consider that the testator's own conduct has reasonably led to the litigation. The whole series of facts proved before me must be taken in connection with each other; no single fact can be separated from the rest. Broadly the case was this: a man secluded himself and lived entirely apart from society, neither giving nor receiving visits. He continued that course of life for many years, and in his later years—the years immediately preceding and subsequent to the execution of the will—and down to the time of his death, his habits became more and more singular. I came to the conclusion that some of his acts might be accounted for by the fact that he gave way to intemperance of a particular kind. He does not seem to have taken much if any more stimulant than before; but he continued to take the same amount, notwithstanding increasing weakness and indigestion, and what he took had a greater effect upon him. When under the influence of drink he gave way to irrational and passionate expressions of anger against those about him and others. I acquitted him of the graver acts imputed to him, but I saw no reason to doubt the substantial truth of the statements of Mrs. Mechi, the landlady of the lodgings at which he lived from early in 1870 until his death, as to what he said and did. He was occasionally betrayed into violence of language amounting to threats against her. She gave the best possible proof that she really entertained doubts of his sanity, and of her safety if he remained with her, for she said that she gave him notice to quit in consequence of his becoming too "vicious." Added to this, there were some acts proved to have been done by him which have a considerable bearing on this question. On one occasion, for instance, he tore up his clothes. I agree with the medical witnesses, that, although a wanton, causeless destruction of property is a strong indication of madness, a single instance of such destruction cannot be taken as the basis of an opinion, but the act was a strange one. The singularity, too, of the will in many respects must be considered. I do not dwell on his giving so much to charitable societies; but it was singular to choose as executor, and one of the residuary legatees, a person of whom he knew nothing, except that he was an undertaker, and had buried some members of his family. The result is that I

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come to the conclusion that the testator did by his conduct naturally lead those interested in his property to suppose that there was ground for alleging that he was of unsound mind. The next of kin had no means of personally forming an opinion as to the condition of the testator during the later years of his life, for she never saw him. I regret that it is not in my power to direct the costs to be paid rateably by the residuary legatees and the charities who benefit so largely by the testator's bounty; but I may make the reflection, that it was plainly not the testator's intention that there should be any large amount to be divided between the residuary legatees: indeed, his anticipation that there would be little or no residue was urged as a reason for his disposing of it as he did. Besides, the fact that the loss occasioned by this order as to costs will fall on the residuary legatees is common to all these cases. On the grounds I have stated the defendants' costs must be paid out of the estate.

Solicitors for plaintiff: *Wilkinson & Drew.*

Proctor for defendants: *J. Wills.*

[Law Reports, 3 Probate and Divorce, 35.]

Feb. 4, 1878.

35]

*IN THE GOODS OF REYNOLDS.

Will — Codicil — Subsequent Will — Codicil referring to first Will by Date — Revival.

The deceased executed a will in 1866, and a codicil to it in May, 1871. In November, 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the will of R., dated May, 1866." It concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced, "Codicil to the will of R., dated May, 1866, in presence of," etc.:

Held, that the only intention to be gathered from the words of the codicil was that the testator intended to revive the will of 1866, but not the codicil of May, 1871.

BRYAN REYNOLDS, late of Cheltenham, Gloucestershire, died on the 27th of December, 1872. Several wills and codicils were found on his death, both attested and unattested, in all of which, after making provision for his wife, he constituted his son William Brook Reynolds residuary legatee and sole executor. On the 18th of May, 1866, he executed a will in which he gave to his wife 20*l.* and his leasehold property at Somers Town for life, with directions that she should not mortgage or sell her interest in such leasehold property. He made his son residuary legatee, and appointed him sole trustee and executor. By a will dated the 12th of December, 1870, the deceased disposed of his whole

property, and thereby revoked the will of May, 1866. Some time previous to May, 1871, the deceased handed an envelope (which had been sealed, but opened) to his son, which he stated to be his last will and testament, and directed him to take charge of it until after the testator's death. He did so, and it was found to contain the will of the 18th of May, 1866. On the 12th of May, 1871, the testator executed a codicil, which purported to be a codicil to the will of May, 1866. By this the wife took the interest of fifteen Union Bank shares for life, and the household furniture absolutely, except certain articles of plate, &c., specially mentioned. This codicil was found in an envelope endorsed "Codicil of the will of Bryan Reynolds, dated the 12th of May, 1871. The will in the possession of William Brook Reynolds." On the 7th of November, 1871, he completed another will, in which he revoked all other wills and codicils. By this he gave Mrs. Reynolds 20*l.*, the dividends from twenty-five *Union Bank shares for life, and the furniture, with the [36 same exceptions, or nearly so, as in the codicil of May, 1871. On the 19th of December, 1872, he executed another codicil in the following terms. "This is a codicil to the will of Bryan Reynolds, dated May, 1866. I give to my son William Brook Reynolds my leasehold property in Somers Town, in the occupation of J. W. Lane, also my house, 49, Pembroke Square, Kensington, in trust, that he shall pay the respective rents to my wife during her life in such manner that she may not anticipate or transfer the said rents before they shall become due. I give to my wife the furniture and effects in my dwelling-house, except, &c. (the exceptions were almost the same as in the codicil of the 12th of May, 1871), and I confirm the appointment of my son as residuary legatee and executor of my will and codicil." The attestation clause commenced, "Codicil to the will of Bryan Reynolds, dated May, 1866, in the presence of us," &c.

Dr. Spinks, Q.C., moved for probate of the will of the 18th of May, 1866, and the codicil of the 19th of December, 1872, as together containing the will of the deceased. There is no evidence of intention to be gathered from the words of the codicil, except from the reference to date, but all the circumstances go to show that the testator intended the will of May, 1866, to be his last will, and that he desired to revive it by the codicil of the 19th of December, 1872. On the other hand, there is no evidence that he intended to revive the codicil of May, 1871. It is obvious that he intended to substitute the new codicil for that. He referred to *In the Goods of May* ⁽¹⁾.

SIR J. HANNEN. I entirely agree with what has been said by *Dr. Spinks*. The codicil of December, 1872, is expressly stated

(1) Law Rep. 1 P. & M., 575.

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to be a codicil to the will of May, 1866, and there is nothing to show that the testator did not mean what he said, namely, that it should be a codicil to that will. The result is, that in effect he revived that will. At the same time there is nothing to show that he also intended to revive the codicil of May, 1871; therefore such codicil is not revived. I decree probate of the will of May, 1866, and the codicil of December, 1872.

Proctor: *E. W. Crosse.*

[Law Reports, 3 Probate and Divorce, 37].

Feb. 11, 1873.

37]

*BRUNT V. BRUNT.

Will destroyed by Testator when suffering from Delirium Tremens—Subsequent Recognition of the Act.

The testator, having duly executed his will, subsequently, when suffering under an attack of delirium tremens, tore it in pieces. The pieces were preserved, and on his recovery he was informed of what he had done, and he answered he must have been mad when he did the act, and that he would make a fresh will, which intention he did not carry out:

Held, that the will was not revoked.

WILLIAM BRUNT, late of Sidney Street, Commercial Road, Middlesex, publican, died on the 6th of August, 1872, having executed a will bearing date the 22d of November, 1869, in which he appointed his wife, Jane Gratton Brunt, the plaintiff, sole executrix. By his will he left the whole property to his wife so long as she remained his widow, and in case she died his widow the property was to go to his son William Charles Harry Brunt absolutely; but in case she married again he gave one moiety to her for her separate use, and the other moiety to his son, absolutely. The plaintiff having cited the defendant, the only child of the testator, to enter an appearance, which he did not do, propounded this will in an ordinary declaration. It appeared from the evidence of Dr. Grant, the medical attendant on the deceased, that in the month of October, 1871, he was suffering from delirium tremens, and that whilst under such an attack he was incapable of transacting business, nor was he responsible for his actions; but that after the attack had passed off he could understand and answer questions put to him, and occasionally, but not always, knew the state he had been in. The plaintiff deposed that in the same month of October, at the time Dr. Grant was in attendance upon him, the deceased went up to his bedroom one morning at 2 A. M. very drunk, and opened his iron safe in order to put away the money he had taken during the previous day. That, seeing the will there, he deliberately

tore it up into fragments, and threw them on the table, at the same time muttering to himself. That on his leaving the room she collected the pieces together and locked them up, without saying anything to her husband at the time, although she *afterwards informed him of the fact. It appeared also [38 that in February, 1872, when he was much better, having abstained from drink for some time, in the presence of Mrs. Ives, the plaintiff's sister, the deceased, referring to the destruction of the will, said he must have been insane when he did it, and would make another. At the conclusion of the evidence,

SIR J. HANNEN said: Assuming that the deceased was out of his mind when he destroyed the will, what was the effect of his recognition of the act after the attack had gone off?

Feb. 4. *R. A. Pritchard*, for the plaintiff. In order that a will be duly revoked by tearing, an act and intention must combine at the same moment of time. The act cannot be done at one time, and the intention be formed at another. When deceased tore up his will he was not capable of forming an intention, so that there was no revocation at that period, and it is not material what intention the deceased formed afterwards. Moreover, as the will was duly executed, the presumption is against revocation, which must be proved by the party affirming it. He referred to *Sprigge v. Sprigge*. (1) *Cur. adv. vult.*

Feb. 12. SIR J. HANNEN. In this case a will was propounded which it was alleged the testator had destroyed when suffering under delirium tremens, that is, when he was insane. The evidence satisfied me that the testator was in an unsound state of mind when he tore up the will; he was suffering from delirium, and therefore not capable of exercising any judgment in the matter. The pieces were collected and put together, so that the will is now restored to the condition in which it was before the destruction. The testator after the recovery of his senses expressed regret at what he had done, and said he would make another will. I am of opinion that under these circumstances there was no revocation of the will by destruction. The act done by the testator can in no sense be considered his act, for he was then out of his mind; so that there has never been anything at all amounting to a *revocation. *After his recovery [39 he expressed regret, and proposed to make a fresh will. The circumstances are exactly the same as those in *Borlase v. Borlase* (2). At page 139 Sir H. Jenner Fust says, "The deceased was at the time (of the destruction of the paper) in a state of mental excitement, and insane, and not master of his actions, and consequently not responsible for his act, as if it had been

(1) Law Rep., 1 P. & M., 608.

(2) 4 No. of Ca., 106.

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the act of a competent person; and consequently the attempt at destruction, or even the actual destruction of the codicil, by a person in such a state of mind, has no effect. The pieces of the paper were saved and sealed up in an envelope, with a memorandum setting forth the fact of the tearing by the deceased. This attempted destruction, therefore, cannot have the effect of a revocatory act. The deceased is said to have immediately recovered his faculties, and to have expressed regret at the act. I think this is not improbable, looking at the nature of the attacks he was subject to; but whether or not this be so, whether he did recover himself immediately after or not, if at the time of the attempted destruction he was not of sound mind, the act can have no effect upon the instrument he attempted to destroy; and therefore nothing, it appears to me, can in any way affect the disposition contained in the codicil." [decree probate of the will.]

Proctors: *Pritchard & Sons.*

Where the testator had given his will to the possession of his wife, had afterwards frequently made ineffectual searches for it, with a view of destroying it, and the wife, the sole deviser therein, brought forward a paper alleging it to be his will, and burnt it in his presence, which he immediately declared to be right; held not to amount to a revocation of the will. *Clingan v. Micheltree*, 81 Penn. St. R., 25.

To make a cancellation, burning, or obliteration of a will efficacious as a revocation, it must be done by the *express direction* of the testator, and his subsequent ratification is not equivalent to a previous command. *Clingan v. Micheltree*, 81 Penn. St. R., 25.

The mere act of tearing a will does not of itself amount to a revocation unless it be accompanied by the intention of revoking. The intention is purely a question of fact; and if the intention were only inchoate, and not completed, it does not, in point of law, amount to a revocation. *Doe v. Perke*, Gow, N. P. Rep., 186.

Parol evidence is inadmissible to show, of itself, the revocation of a will; such evidence can only be introduced to explain and show the intention of equivocal acts by the testator or by his direction, destroying or abrogating a will. *Hargreaves v. Rudd*, 48 Geo., 142.

After the death of a testator, his will, dated in 1844, was found with his original signature erased, but another

signature by him was found a short distance beneath. Held, on the facts and circumstances deposed to, that the original signature was not erased *animo revocandi* as required by the wills act, and that in the probate, the original signature must be restored, and the second signature omitted. *Matter of King's Goods*, 2 Robertson's Ecc. Rep., 403.

A testator executed his will in 1843, which remained in his custody until his death, when it was found in a mutilated state — torn and cut; but the signature of the testator and of the attesting witnesses remained at the end of the will. The testator died suddenly. Held, in the absence of extrinsic evidence, from the peculiar manner in which the mutilations were effected, that there was no intention to *revoke* the whole will, but that the papers as altered, were intended for a draft of a new will, and in the event of his not making a new will, to operate as his will. *Clarke v. Scripps*, 2 Robertson's Ecc. Rep., 563.

A, having a will and codicil, cut off the last page of the will, on which were the names of A and the witnesses, and desired B to burn the page so cut off. A then made some alterations in the remaining pages of the will, desired B to write out a new will, and send for A's solicitor. B wrote the new will, but did not burn the part cut off as A knew. A died before executing the new will

The former will was admitted to probate, there being no intention to revoke, except in connection with the completion of a new will. Will of Cockayne, Deane & Swabey, 177.

In the case of a will and codicil, where the concluding words of the codicil, and the name of the testator attached thereto, are torn off, the name and seal to the will remaining entire; Held that the codicil was cancelled by the act of tearing; and that it lay upon the party who wished to establish it to show that the cancellation was done by accident or mistake, or without an intention to revoke. In such case the legal presumption is that the tearing was done by the testator himself when of sound mind.

In tearing the name from the codicil, a part of the will written on the opposite side of the sheet was also torn; and the jury were instructed that if by mistake, intending only to cancel the codicil, the testator tore off a part of the will, forgetting that there was writing on the other side, the will would not thereby be cancelled. Held, that the jury might have been instructed as matter of law that there was no cancellation of the will. Matter of Cook's will, 8 Am. Law Jour., 353, 5 Penn. Law Jour. Rep., 1.

Where it was shown that "One Warner by his will in writing devised the lands in question to Henry Etheringham, and the heirs male of his body, and bailed the writing with the scrivener to keep, and four years after died; about a fortnight after his death this writing was found in the scrivener's study, gnawn all to pieces with rats, yet he, with the help of the pieces, and

of his memory and other witnesses, caused it to be proved in the ecclesiastical court; and now the court demanded of the witnesses, whether a stranger that knew not the contents of the will before, by joining of the pieces together could tell that the devise of the lands in question was to Etheringham and the heirs male of his body; for they did agree that if this clause could be made out, though by joining of the pieces, it were a good will for all that. Whereupon the court directed the jury that if they found the will was gnawn before the death of the deviser, then 'twas for the plaintiff; if after, for the defendant; and the jury found for the defendant in favor of the will." *Etheringham v. Etheringham, Aleyn*, 2.

Mere exaggeration of the conduct of a party benefited by a will, towards the testatrix, though it induce her to revoke the will, and the bequest made in his favor, and to execute another will to his exclusion, is not such a fraud as to destroy free agency, and render the will invalid. Neither does such conduct amount to undue influence or importunity. *Browning v. Budd*, 6 Moore, P. C., 430.

Otherwise, if the testator be induced to destroy his will in consequence of false and fraudulent statements and through undue influence. *Voorhis v. Voorhis*, 50 Barb., 120, 125-7, affirmed, 39 N. Y., 463.

As to the proof and establishing of lost wills and wills fraudulently destroyed, see Moak's Note to Clarke's Chy., 133-4, new ed.

As to what is and what is not a valid revocation of a will, see 1 Redf. on Wills (2d ed.), 302-332; 3 id. 15-18.

[Law Reports, 3 Probate and Divorce, 39.]

Feb. 25, 1878.

IN THE GOODS OF MAYER.

Administration — General Grant to Receiver appointed by Court of Chancery.

Proceedings in Chancery having been taken by persons having claims upon the estate of an intestate, against his widow, who was alleged to have possessed herself of part of the estate, but who had not taken out administration, the Court of Chancery appointed a receiver, with authority to collect, get in, and receive the estate, and to apply to the Court of Probate for administration. The widow, and all the next of kin and persons entitled in distribution having been cited, upon their non-appearance to the citation, the court made a general grant of administration to the receiver.

1873

In the Goods of Mayer.

JOSHUA HEATH MAYER, late of Newcastle-under-Lyme, in the county of Stafford, accountant, died on the 18th of September, 40] *1872, intestate, leaving Eliza Mayer, his widow, him surviving, and Joshua Heath Mayer, Amy Mayer, and Ada Mayer, his only next of kin, and the only persons entitled in distribution to his personal estate and effects. Joshua Heath Mayer and Thomas Edge were executors of the will of Edward Barker, late of Newcastle-under-Lyme, innkeeper, deceased, and both of them had proved it, but Mayer only had acted. It was alleged that Mayer had possessed himself of personal estate of the testator of considerable value and appropriated it to his own use, and a sum exceeding 300*l.* was claimed to be due from Mayer's estate to Barker's estate. The personal estate of Mayer was believed to be insufficient for the payment of his debts, including this claim, and funeral expenses. On the 6th of November, 1872, Thomas Edge, on behalf of himself and all the creditors of Mayer, filed a bill in Chancery against Eliza Mayer, the widow, and her brother, Herbert Pearce, wherein he alleged *inter alia* that although Eliza Mayer had not taken out letters of administration to the personal estate and effects of her husband, she and the said Herbert Pearce had collected and got in a considerable portion of the said estate, and that he, Thomas Edge, had applied to the Court of Probate for a grant of administration as a creditor, but the court had refused his application. On the 14th of November, 1872, an order in the suit was made by Vice-Chancellor Malins, to the following effect: "That Mr. Thomas Bayley, of Newcastle-under-Lyme, in the county of Stafford, auctioneer, be appointed to collect, get in, and receive the outstanding personal estate of Joshua Heath Mayer, the intestate in the bill named, until the grant of letters of administration to the intestate's effects, with liberty for the said Thomas Bayley to apply for letters of administration. And it was ordered that the defendants, Eliza Mayer and Herbert Pearce, should deliver and pay over to the said Thomas Bayley, on oath, all property and moneys of the intestate, and all books and papers relating to the said outstanding personal estate then in their or either of their possession or power. And that the said Thomas Bayley should from time to time pass his accounts and pay the balances to be certified to be due from him into the bank, with the privity of the accountant general, to the credit of this cause, *Edge v. Mayer* [1872, E. 62]; and that such balances, 41] when so paid in, be invested in bank *three pounds per cent annuities on the like credit, and that the interest as it accrued thereon, and all accumulations of interest, should be invested in like manner on the like credit. And it was ordered that an injunction should be awarded against the defendants

until further order from receiving, getting in, or interfering with the personal estate and effects of the said intestate, and from selling, or disposing of, or parting with any part of such personal estate and effects as might be in their, or either of their possession or power, except to such receiver." Thomas Bayley had since cited Eliza Mayer, the widow, and the said Joshua Heath Mayer, Amy Mayer, and Ada Mayer, to accept or refuse administration, or show cause why it should not be granted to him. The citation had been personally served, and no appearance had been entered.

Searle moved for a grant of administration to the said Thomas Bayley. All the persons entitled to the grant had been cited, and the applicant, having been appointed receiver by the Court of Chancery, would be obliged to administer the estate under the direction of that court.

SIR J. HANNEN. Although no precedent can be found for such a grant, I think, under the circumstances, it is reasonable to make it. A general grant of administration may issue to Thomas Bayley.

Solicitors: *G. L. P. Eyre & Co.*

[Law Reports, 3 Probate and Divorce, 42].

March 4, 1873.

*IN THE GOODS OF DE LA SAUSSAYE.

[42

Will — Codicils — Further Codicil confirming the Will only, and called the last and deliberate Will.

The testator, by birth a British subject, but domiciled in Spain at his death, executed a will in England, and subsequently several codicils valid by the law of Spain. Lastly, he executed a paper in England which confirmed the English will in whatever it did not clash or interfere with the contents of the codicil, which was to be considered as his last and deliberate will:

Held, that the Spanish codicils were not revoked by the last-mentioned paper, but, as forming part of the will which did not clash with such paper, were confirmed by it.

SIR RICHARD DE LA SAUSSAYE, Knight, died on the 27th of October, 1872, having left several testamentary papers, which are set out in the judgment. He was by birth an Irishman, but had become domiciled in Spain; had served in the Spanish army, and attained the rank of field-marshal therein.

Feb. 18. *Dr. Tristram* applied to the court to determine which of such papers were entitled to be admitted to probate.

Cir. adv. vult.

March 4. SIR J. HANNEN. The deceased in this case left the following testamentary papers: 1. A will made in Spain on the

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14th February, 1868. 2. A will duly executed and attested in London on the 12th of March, 1869, whereby he revoked all former wills. 3. A codicil made at Madrid, on the 2d of July, 1871, whereby he bequeathed to Donna J. Z. de Orduna twenty-five railway debentures, then deposited with bankers at Madrid; and by a further codicil of the same date he appointed a person therein named as his executor, for the sole purpose of carrying into effect the said testamentary disposition, and of seeing to his interment in case of his demise taking place at Madrid. 4. A codicil made at Madrid on the 27th of May, 1872, whereby he bequeathed, independently of all other testamentary dispositions which he had made, or which he might make, thirty railway bonds to Donna B. Damian, and after her death to her son, and in the event of his not surviving his mother, and in certain other contingencies, to the director of the College of Noble Irishmen at Salamanca, for the purposes therein specified; and the testator appointed simply for the said effects, and for the carrying out of the said dispositions and testament, Senor W. Marmel Diaz, of Barrazan, as his executor. 5. A codicil made at Madrid on the 20th of June, 1872, whereby he reduced the legacy to Donna J. Z. de Orduna of railway debentures from twenty-five to fifteen, and left her a share and a half in a mine, and appointed the said lady his sole executrix only in regard to the wearing apparel, effects, and furniture belonging to the testator, which were to become her property at the period of his demise, in addition to the debentures and the share and half share in the mine. 6. A codicil duly executed and attested in London on the 29th of July, 1872, whereby the testator revoked and annulled all legacies and other testamentary dispositions, of whatever nature, made in his will, executed in London on the 12th of March, 1869, with certain specified exceptions, and left annuities and legacies to various persons. No mention is made in this codicil of the Spanish codicils, or the property with which they dealt. It concludes thus: "I confirm the dispositions contained in my will of the 12th of March, 1869, in whatever does not clash or interfere with the contents of this codicil, which is to be considered as my last and deliberate will and testament, and to be fulfilled accordingly." 7. A further codicil, duly executed and attested in London on the 30th of July, 1872, whereby he bequeathed to Donna J. Z. de Orduna 120*l.* a year for her sole and separate use, independently of her present or any future husband; and he further declares it to be his will that any jewels, watches, &c., which he might die possessed of, and which were not otherwise disposed of, should be given, together with the family plate, and generally all articles in his personal use, to his niece, Mary Orr, abso-

lutely, and he confirmed his former will and codicil in everything not in contradiction to the present. The Spanish codicils are not attested, with the exception of that of the 27th of May, 1872, which is attested by the executor therein named as a witness, and as accepting the office, but it is proved by a Spanish advocate that these codicils are all valid according to the Spanish law; but he adds that he feels inclined to think that the Spanish codicils have lost all their force and efficacy through the posterior execution of the English codicils. It is clear that the mere fact of a testator having executed a testamentary paper of a later date does not of itself invalidate *an earlier disposition. [44 The question is always one of the intention to be collected from the language of the posterior instrument. Did the testator intend that the later paper should be taken as his final and complete will to the exclusion of all others, or did he mean that it should be taken in conjunction with the previous instruments? If there appears any inconsistency between two papers, this is a certain indication of the testator's intention, and the later must prevail and revokes the former to the extent to which it is inconsistent with it. In the present case, however, there is no such inconsistency. The express revocation contained in the English codicil is confined to certain portions of the will of the 12th of March, 1869, and the only words which can be referred to, from which to imply an intention on the part of the testator to revoke his Spanish codicils, are the concluding words of the English codicils, in which he confirms his will of the 12th of March, 1869, in whatever does not clash or interfere with the contents of the codicil which is to be considered as his last and deliberate will. I am, however, of opinion that this ratification of the will of the 12th of March, 1869, does not affect the Spanish codicils. These codicils must be deemed to be parts of the will, and are themselves confirmed by the ratification of the will of which they were modifications, *Crosbie v. Macdoul* ⁽¹⁾. Nor does the fact that the testator speaks of his English codicil as his "last and deliberate will" affect the earlier codicils. Similar words were formerly held to be revocatory of earlier instruments: *Plenty v. West* ⁽²⁾; but this case, and others to the same effect (as was pointed out by Lord Penzance in *Lemage v. Goodban* ⁽³⁾) must now be taken to be overruled by *Cutto v. Gilbert* ⁽⁴⁾ and *Stoddart v. Grant* ⁽⁵⁾. In the present case I can find nothing indicative of an intention to revoke the dispositions of the Spanish codicils, and I therefore pronounce for their admission to probate with the English

⁽¹⁾ 4 Ves., 610.⁽²⁾ Law Rep., 1 P. & M., 57.⁽³⁾ 1 Robert., 264.⁽⁴⁾ 9 Moo. P. C., 181.⁽⁵⁾ 1 Macq., 168.

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documents, as together constituting the complete testamentary disposition of the deceased. The probate will, however, only be granted to the executors appointed by the English will.

Attorney : *Norris*.

[Law Reports, 3 Probate and Divorce, 45.]

March 4, 1878.

45]

*IN THE GOODS OF DONALDSON.

Will — Scotch Disposition and Settlement — Probate.

Testator executed a trust disposition and settlement, valid according to the law of Scotland, and applicable to the whole heritable and movable estate which should belong to him at the time of his death. He subsequently executed a will, by which he disposed of all his real and personal estate, whether in Scotland or England. By the law of Scotland, the English will was ineffectual as a conveyance of the Scotch heritage, and did not revoke the previous settlement, and the two documents together form the complete testamentary disposition of the testator. The deceased's domicile was English, but he had a freehold estate in Scotland. The court granted probate of the will and trust disposition as together containing the will of the deceased.

JOHN DONALDSON, of North Shields, Northumberland, master mariner, died on the 8th of October, 1865, having executed a will, dated the 5th of August, 1865, by which he disposed of all his real and personal estate, whether in England or Scotland. This will was proved in the district registry of Newcastle in August, 1872, by John Donaldson, the son of the deceased and the surviving executor named in it. Up to the year 1820 he deceased was domiciled in Scotland, and was resident at Dundee; but at the time of his death his domicile was English. His personal estate in England was of small value; he was, however, possessed of freehold property situate at Dundee. By a Scotch disposition and settlement, dated the 21st of January, 1851, the deceased conveyed to trustees his whole heritable and movable property, and gave to them power to sell the same; under which power a part of such property had been sold, and the proceeds of the sale remain in the hands of James Dickson, of Dundee, the surviving trustee named in the deed. He further reserved to himself in this deed a power to alter the same, in whole or in part, and to revoke, cancel, or annul it as he might think proper. This deed was duly registered according to the law of Scotland, in the general registry of saisines situate at Edinburgh, but applicable to the county of Forfar. After the deceased's will had been proved in this country, the probate was sent to Scotland for confirmation by the Commissary Court of Edinburgh, where it was objected that the deceased's will and the said disposition and settlement must be read together as containing the will and final disposi-

tion of both the heritable *and movable estate, but that [46 the Commissary Court had no power to make a confirmation of the will with such disposition and settlement added or annexed thereto, unless such disposition and settlement were first admitted to probate in England. A Scotch advocate advised that, even if the English will is duly executed according to the law of England, it is ineffectual as a conveyance of the Scotch heritage; and that it does not, by implication, revoke the previous trust disposition in the Scotch form, which effectually conveyed the heritable property in Scotland to the trustee appointed by that instrument. That the trust disposition and the settlement and will must be read together as containing the final testamentary intentions of the testator; the former being good as transmitting the heritable estate to the trustees therein named, and the latter being effectual as a transmission of any personal estate which belonged to the testator at the time of his death, and also as expressive of the trusts under which the Scotch property should be held or applied, and further indicating the testator's intention that the trustees appointed by the English will should supersede those appointed by the trust disposition and settlement, and that it is the duty of the trustees under the Scotch disposition and settlement to convey or pay over to the executor under the English will for the purposes of the will the trust estate in Scotland; and that the English executor, in order to complete his title, should obtain probate of the trust disposition and settlement, and of the English will, as being together the will of the said deceased; and that the executor of the English will would thereby become entitled to give a valid discharge to the Scotch trustee on his conveying the trust estate to the English executor. Mr. Dickson, the surviving trustee under the trust disposition and settlement, is desirous of having a release from such trust estate; and Mr. John Donaldson is willing to execute a discharge to him for the same when he can legally do so.

Feb. 8. *Dr. Spinks*, Q. C., moved the court to revoke the probate already granted, and to admit the trust disposition and settlement, together with the will, to probate, as together containing the will of the deceased. He referred to *Lemage v. Goodban* (¹). *Cur. adv. vult.*

*MARCH 4. SIR J. HANNEN. The deceased, John Donald- [47 son, a native of Scotland, but domiciled in England, died at North Shields on the 8th of October, 1865. By his will, dated the 5th of August, 1865, he disposed of all his real and personal estate, whether in England or Scotland, and appointed his son,

(¹) *Law Rep.*, 1 P. & M., 57.

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John Donaldson, and a person since deceased, his executors. This will was proved by John Donaldson in the district registry of Newcastle-upon-Tyne in August, 1872. The deceased was possessed of a small amount of personal property in England. He was also possessed of freehold property in Scotland. By a Scotch disposition and settlement, dated the 21st of January, 1851, duly executed, and having a testamentary effect by the law of Scotland, the deceased conveyed to James Dickson and other persons since deceased, upon certain trusts, his whole heritable and movable estate then belonging, or which should belong to him, at the time of his death, with power to the testator at any time of his life to alter the same trusts in whole or in part, and to revoke, cancel, and annul the same as he might think proper. It appears, from the opinion of a Scotch advocate, that the English will is ineffectual as a conveyance of the Scotch heritage, and that it does not revoke the previous trust disposition in the Scotch form, which effectually conveyed the heritable property in Scotland to the trustees appointed by that instrument. Upon the assumption that by the law of Scotland the English will was inoperative upon the Scotch settlement, the complete testamentary dispositions of the deceased are not to be found in the English will alone, but in that instrument construed together with the Scotch settlement; and in this state of things this court will admit to probate the several instruments which together contain the last will of the testator: *Lemage v. Goodban* ⁽¹⁾. I therefore order that the probate of the English will already granted be revoked, and that a regrant be made of probate of that will, together with the Scotch disposition and settlement, as prayed.

Attorneys: *Hopwood & Sons.*

[Law Reports, 3 Probate and Divorce, 48.]

March 11, 1873.

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*IN THE GOODS OF SAMSON.

Will—Executor not resident in England—20 & 21 Vict. c. 77, s. 73—Special Circumstances—Administration with Will annexed.

The Court of Probate cannot pass over an executor by reason of his bad character only; he must also be resident out of the United Kingdom at the time of the death of the deceased, in which case it may make a grant of administration, under 20 & 21 Vict. c. 77, s. 73, to some other person with such limitations as it may think fit.

CELIA SAMSON of Brussels, widow, died on the 12th of January, 1873, having executed a will dated the 26th of June, 1872, in which she appointed her sons, Barron Samson and Phineas

(¹) Law Rep. 1 P. & M., 57.

Samson, executors. By this will, with the exception of a legacy of 200*l.*, the whole property was left to be equally divided between the testatrix's children living at the time of her death. The deceased left surviving her two sons and four daughters, of whom Marian Matilda Greenberg, the wife of Simeon Greenberg, and resident at Birmingham, was one. The property of the deceased consists principally of shares and bonds deposited in her own name in the National Bank at Brussels of the value of about 3000*l.*, and of a small amount of property in this country of the value of 200*l.* Barron Samson, one of the executors, has been for some time resident at Brussels, where he carries on the business of a broker. Phineas Samson is resident in Australia. On application being made for probate of the will of the deceased on behalf of Barron Samson, it was found that a caveat had been entered on behalf of Marian Matilda Greenberg, and notice was given that an application would be made to the court to grant to her administration with the will annexed of the goods of the deceased under 20 & 21 Vict. c. 77, s. 73. Affidavits were filed, in which it was alleged that Barron Samson had left Birmingham many years ago in embarrassed circumstances, and without having paid his debts, and generally that he was not a fit and proper person to be entrusted with the estate of the deceased, but the facts were denied or explained on oath by Barron Samson.

Inderwick moved the court on the affidavits to grant the administration to Mrs. Greenberg. The 20 & 21 Vict. c. 77, s. 73, authorizes *such a grant, because the executor is not resident in this [49 country, and there are special circumstances, namely, that the executor has no apparent business or profession, and has not paid the debts he incurred in this country. He cited *In the Goods of Cooke* ⁽¹⁾; *In the Goods of Keane* ⁽²⁾. If the executor will offer some respectable person as a guarantor for the due distribution of the estate, the opposition will be withdrawn.

Searle, for the executor. Before the passing of 20 & 21 Vict., c. 77, the Court of Probate could not refuse to grant probate to an executor on account of his poverty or insolvency: *Williams' Executors* (4th ed.) pt. 1, bk. 3, ch. 1, p. 192; and that act was only intended to apply to executors who were not willing or competent to take probate, and therefore it was necessary or convenient to grant administration to another person. The charges made against the executor are of old date, and are disproved. He cited *Smethurst v. Tomlin* ⁽³⁾; *In the Goods of Cooper* ⁽⁴⁾.

SIR J. HANNEN. I am of opinion that the application must be refused. I was anxious to have the assistance of counsel in con-

⁽¹⁾ 1 Sw. & Tr., 267; 28 L.J. (P. M. & A.), 43. ⁽²⁾ 2 Sw. & Tr., 143; 30 L.J. (P. M. & A.), 269.

⁽³⁾ 1 Sw. & Tr., 265; 28 L.J. (P. M. & A.), 34. ⁽⁴⁾ Law Rep., 2 P. & M., 21.

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sidering the proper effect to be given to the 73d section of the probate act. I think it right to say that I am of opinion that I have power to make the order which I am asked to make in the state of circumstances existing in this case; but it seems to me that it is by an accident, as it were, I have that power. The 73d section does not give me power to refuse probate to any executor appointed by a testator by reason of the badness of his character, but only in certain cases, namely, to such persons as shall be at the time of the testator's death out of the United Kingdom, and therefore beyond the jurisdiction of this court; and there must be superadded a necessity or convenience that such person should not be allowed to act. The necessity or convenience is further defined as that arising from the insolvency of the estate of the deceased or other special circumstances. This provision gives me power, where the executor is resident out of the country, if I think he is, by reason of his position 50] there or his *bad character, unfitted to act, to exercise a discretion, and refuse him the appointment. But it is plain I must not, merely because the executor is out of the country at the time of testator's death, lightly set him aside on the ground that some accusation has been brought against him, although in some cases I may do so. The executor's appointment is derived from the will. It is the intention of the deceased that that particular person shall have control over his property after death; and although in certain cases the section empowers me to give another person such control, unless the legislature thinks proper to arm me with a general power I ought not to assume it. The will in this case is the will of the mother made by her in 1872, years after the transactions took place which are referred to in the affidavits, and the character and circumstances of which could not have been unknown to her. Nevertheless she has thought fit to entrust the management of her affairs to her son. I am asked by some members of the family to try the character of the son on charges of ancient date and of a conflicting nature, and which have been contradicted by himself. Even assuming the truth of the statements made against him, there is nothing to show that he has not for years past reformed, and down to the present time led a respectable life. I cannot on those affidavits come to the conclusion that he is an unfit person to take the grant or unworthy to have the control of the property which his mother has given him. As this was an experimental application and without foundation, it must be refused with costs.

Attorney for plaintiff: *W. H. Reece.*

Attorneys for defendant: *Boulton & Sons.*

[Law Reports, 3 Probate and Divorce, 50.]

March 18, 1873.

IN THE GOODS OF IHLER.

Administration—Widow or Next of Kin—Judicial Separation by reason of Cruelty of Wife.

The court will not, at any rate without notice, pass over the widow, who has been legally separated from her husband by reason of her cruelty, in granting administration to his estate.

JOHN CRICHTON IHLER, of Ashburnham Road, Greenwich, Kent, died on the 15th day of January, 1873, intestate, leaving him surviving *his widow, Charlotte Barker Ihler, and two [5] daughters, the only persons entitled to his personal estate. Mr. Ihler and his wife lived together until the years 1864, but in that year they separated, the husband making his wife an allowance. In the year 1865, Mrs. Ihler filed a petition in the Court for Divorce for a restitution of conjugal rights, to which the deceased appeared, and pleaded his wife's cruelty, and prayed for a judicial separation by reason thereof. The case was heard before Sir James Wilde, J.O., in June, 1865, and on the 23d of June, he made a decree of judicial separation between the parties on the ground of Mrs. Ihler's cruelty to her husband, and ordered him to pay her for her maintenance 1*l.* a week, which he continued to do until his death.

March 11. *Dr. Middleton* moved the court to grant administration to Charlotte Bowman Ihler, the eldest daughter, passing over the widow. Although that is usually done for immorality only, still it would seem reasonable it should be done wherever the parties are living separate from the fault of the widow, *Lambell v. Lambell*. (1) If the wife had obtained such a decree, the husband would have not only been deprived of the administration of her property on her death, but of all interest in the property itself (20 & 21 Vict. c. 75, s. 25). *Cur. adv. vult.*

March 18. SIR J. HANNEN. In this case I was asked to pass over the widow, and to grant administration to one of the children, on the ground that during the husband's lifetime a decree of judicial separation, by reason of cruelty, had been pronounced against the wife. It is sufficient for me to say that I cannot pass her over on that ground without giving her an opportunity of showing cause against the application. At the present moment I am disposed to think that there is no sufficient reason why

(1) 3 Hagg. Eccl., 568.

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the widow should be passed over, inasmuch as she has not done anything by which her honesty can be called in question. At any rate I shall give her an opportunity to be heard. I direct that she be cited.

Attorney: J. P. Biggenden.

[Law Reports, 3 Probate and Divorce, 52.]

Dec. 13, 1873.

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*KEANE V. KEANE.

Matrimonial Suit—Costs of Wife—Stay of Proceedings until payment.

The respondent having obtained an order upon the petitioner to pay to her or her attorney a certain amount of taxed costs, endeavored to enforce such order by a writ of *fi. fa.*, but failed in recovering them. The court ordered the proceedings in the divorce suit to be stayed until the taxed costs had been paid by the petitioner, but would not extend the order to the expenses incurred in the suing out and execution of the writ of *fi. fa.*

THIS was a suit for restitution of conjugal rights brought by the husband against his wife. She appeared and filed an answer, in which she prayed for a judicial separation. On the 28th of February, 1872, the questions at issue were directed to be tried before the court itself. On the 16th of April, 1872, an order was made upon the petitioner to pay to the respondent or her solicitor the sum of 14*l.* 9*s.*, being her taxed costs up to that period, and on the 30th of April, 1872, a further order was made that the petitioner should pay into the registry 65*l.* to cover the respondent's costs of hearing, or that he should give security to the same amount, and that the proceedings should be stayed until the order was complied with. The petitioner gave security in obedience to this order. On the 10th of May, 1872, the respondent applied for and obtained a writ of *fi. fa.* against the petitioner for the recovery of her costs, but on an attempt being made to levy upon the goods of the petitioner, two bills of sale were brought to the notice of the sheriff and he withdrew and made a return accordingly.

Nov. 26. *Dr. Spinks*, Q.C., moved for an order that the proceedings on the petition be suspended until the costs, 14*l.* 9*s.*, the expense of obtaining the writ of *fi. fa.*, the sheriff's charges, and interest, be first paid.

Tatham appeared for the petitioner.

Cur. adv. vult.

Dec. 13. THE JUDGE ORDINARY. This was an application for an order that the proceedings should be stayed until certain costs, 14*l.* 9*s.*, and other expenses, should be paid. *Dr. Spinks* argued in support of the application, that it was the universal

practice of the *court, that the wife was entitled to payment [53 of her costs, and if they were not paid she had a right to a stay of proceedings. I was certainly unwilling to apply that rule to the extent asked; but on an examination of the authorities I find that they bear out Dr. Spinks's proposition, and I am bound to conform to the practice of the court. I therefore must grant the application. In *Chichester v. Mure* (1) the judge ordinary said, "It was the practice of the ecclesiastical courts, when an order for the payment by the husband of alimony or costs had been made, not to appoint a day for the hearing until the order had been obeyed." This is a direct authority in support of the application. But I do not order a stay of proceedings until the payment of any other costs than the sum of 14*l.* 9*s.* As to the expenses incurred by the wife in her endeavor to obtain another remedy, I do not consider that I ought to impose upon the husband the penalty of not being allowed to proceed until those incidental expenses are paid. The ordinary course must be followed as to them; a summons must be taken out, and it must be established to the satisfaction of the court that the petitioner has the means of paying before he can be punished for not doing so. The respondent is entitled to the costs to which she has been put in order to bring her case to a hearing, and to establish her rights by litigation. The costs of this application will also be included.

Attorneys for petitioner; *Prior & Co.*

Attorneys for respondent: *Tippells & Son.*

(1) 8 Sw. & Tr., 228; 33 L. J. (P. M. & A.), 120.

C A S E S
DETERMINED BY THE
HIGH COURT OF ADMIRALTY
AND BY THE
ECCLESIASTICAL COURTS,
IN AND AFTER
MICHAELMAS TERM, XXXVI VICTORIA.

[Law Reports, 4 Admiralty and Ecclesiastical, 1.]

Dec. 11, 1872.

1]

*THE ELPIS. (6161.)

Bottomree—Merger of Claim for Necessaries in Bottomree Bond—Jurisdiction of Court of Admiralty in a Cause transferred from a County Court—The County Courts Admiralty Jurisdiction Act, 1868, (31 & 32 Vict. c. 71), ss. 3-8.

A suit for necessaries was instituted in the Swansea County Court against the owners, unknown, of a foreign brig, which was, at the time of the institution of the suit, at Swansea. The suit was afterwards transferred to this court, and the plaintiffs filed their petition. It appeared from the petition that the claim of the plaintiffs was for money advanced by them to execute necessary repairs to the brig at a British port, and that the money was advanced on the security of an instrument, by which the master of the brig pledged himself and vessel, and her owners, for the repayment of the money, except in case of the total loss of the vessel on her intended voyage:

Held, 1. That the claim set forth by the petition was founded on Bottomree; that the county court had no jurisdiction to entertain such a claim, and that as the cause was transferred to this court from the County Court, this court had no jurisdiction to entertain the suit. 2. That it was not competent to the plaintiffs, upon the facts stated in the petition, to waive the instrument of bottomree and insist on their claim for necessaries, because the claim for necessaries must be considered to be merged in the instrument of bottomree.

In the year 1872, a suit for necessaries was instituted in the Swansea County Court, in pursuance of the provisions of the 2] *County Court Admiralty Jurisdiction Act, 1868, on behalf of Luigi Descalzo and Vittorio Brosinovich, against the owner or owners unknown of the foreign brig Elpis, which was then at Swansea. The plaintiffs found it necessary; in order to establish their case, to procure evidence from abroad, and the County Court having no power to issue a commission for the examination of witnesses abroad, the cause was transferred to this court by an order of the County Court made in pursuance of the power granted by the 8th section of the County Court Admiralty Jurisdiction Act, 1868

The following petition was filed on behalf of the plaintiffs:
1. The above named brig *Elpis* belongs to the port of Syra in Greece. In the year 1869, she was called by the name of *Carlos Primos*, and was lying in the river Tyne, bound for Syra, and required certain necessary repairs to enable her to prosecute her voyage from Newcastle to Syra. 2. *Vassiglios Colucoridis*, the master of the said brig, being without funds and credit at Newcastle, and being unable to obtain money to enable him to get the said repairs executed, and to pay the expenses necessary to be incurred to enable the said brig to prosecute her said voyage, applied to the said Messrs. *Descalzo, Brosinovich, & Co.*, of North Shields, the plaintiffs in this suit, for the loan of 85*l.* sterling, which sum they lent to him to enable him to get the repairs executed and to pay the said expenses upon the security of the following instrument, which was duly executed by the master of the said vessel.

" 85*l.*

" North Shields, " 20th Sept., 1869.

" Except in case of the total loss of my vessel, the *Carlos Primos* of Syra, on her now intended voyage from Newcastle to Syra, I promise to pay, seven days after arrival there, to the order of Messrs. *Descalzo, Brosinovich, & Co.*, this first of exchange (second and third unpaid), the sum of 85*l.* sterling at the course of exchange as endorsed in London, value received in disbursements for the use and on account of my vessel, *Carlos Primos*, and owners, and I hereby pledge myself, and vessel, and owners, for the payment of the above sum in the manner aforesaid.

" (Signed)

" *Vassiglios Colucoridis.*"

*3. In consequence of the said advance of money, the said [3] brig was enabled to proceed on her said voyage, and arrived safely in the port of Syra, and seven days after her arrival there default was made in payment of the said instrument, which remains, and still is wholly due and unpaid.

The petition concluded with the following prayer: "The solicitors for the plaintiffs pray the right honorable the judge, to pronounce that the said sum of 85*l.* is due, and to condemn the defendants in that sum, with the interest already due, and to grow due thereon, to the day of payment, and also in the costs of the suit, and that otherwise right and justice may be administered to the plaintiffs in the premises."

E. C. Clarkson moved to reject the petition. 1. The petition in form does not comply with the rules of the court, because it does not state the nature of the cause. It is described as a cause simply; it should be described as a cause of necessities or as a cause of bottomree. 2. It appears from the petition that the

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The Elpis.

cause is a cause of bottomree. It is clear from the instrument set out in the petition that sea risk was contemplated, and this is the essential ingredient of bottomree: *The Indomitable* ⁽¹⁾. That if this is a cause of bottomree this court has no jurisdiction to entertain it. The cause is a county court cause transferred to this court, and this court has no more jurisdiction in the cause than the county court had. It is clear that the county court had no jurisdiction in a cause of bottomree (The County Court Admiralty Jurisdiction Act, 1868, s. 3), and if the facts alleged in the petition had appeared in the county court, the county court must have dismissed the cause for want of jurisdiction. 3: There is nothing in the petition to make it appear that the defendants, the owners of the ship, are liable for the money claimed. The petition does not show any personal liability on the part of the defendants; it does not state that they were the owners of the ship at the time, and although there may be a lien on the ship, that lien can be enforced by proceedings in *rem*. The present suit is a proceeding in *personam*.

4] **G. Bruce* in support of the petition. 1. There is no rule of court requiring that the nature of the cause should be stated in the petition. It matters not by what name a cause is called, so long as the nature of the claim appears from the facts stated in the petition. [SIR ROBERT PHILLIMORE: You may address your argument to the other points.] 2. Although it must be admitted that a county court has no jurisdiction to entertain a suit of bottomree, yet when a cause is transferred from a county court to this court, this court may exercise its full jurisdiction over all matters that are involved in the cause. One great object of the clauses in the act enabling suits instituted in the county court to be transferred to this court is to prevent a failure of justice by providing means for bringing within the reach of the extended jurisdiction of this court suits in which the county court, by reason of its limited jurisdiction, is unable properly to determine the rights of the parties. But even if it should be held that this court has in this cause no greater jurisdiction than the county court, it may still entertain the claim of the plaintiffs. The plaintiffs have a claim for necessities independently of the instrument set out in the petition. The holder of the bottomree bond, granted to secure a loan advanced for necessities, is not bound to rest his claim upon the bond; he may waive the bond and claim for the necessities independently of the bond. The doctrine of merger is a technical doctrine of the common law, applicable to instruments under seal and has no application in such a case as the present. It is a common thing to take the double security of bills of ex-

(1) *Swa.*, 446.

change and a bottomree bond for money advanced for the necessities of a ship, but it has never been suggested that the right of action on the bills of exchange is merged in the bond: *The Nelson* ⁽¹⁾. Moreover it is quite consistent with the petition that circumstances essential to the validity of a bottomree transaction, such as communication with the owners, are wanting in the present case, so that, after all, when the facts come to be inquired into, it may be found that the instrument set out in the petition is a void instrument. **[SIR ROBERT PHILLIMORE. [5* Could not the plaintiffs amend their petition by striking out of the second paragraph all reference to the instrument?]*]* An amendment of the petition cannot alter the fact that the instrument in question was given. 3. The present suit is a proceeding in *rem* in the sense in which that term is used in this court. The form of summons which was issued in this case is the only form by which a suit in *rem* can be instituted in the county court. It appears from the proceedings that bail has been given, and the process must have been served upon the vessel.

E. C. Clarkson, in reply. The claim for necessities must be considered as having merged in the bond, because it is clear that the right of the plaintiffs to sue for the necessities would have been lost if the ship had not arrived safely.

SIR ROBERT PHILLIMORE. I have entertained very considerable doubt in the course of the argument as to the course I should pursue in this case, but upon the whole I am inclined to think that my decision must be adverse to the petitioner. The case which was transferred to this court under the authority of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71. s. 8) is a cause of necessities instituted on behalf of the plaintiffs, "Messrs. Luigi Descalzo and Vittorio Brosinovich" against "the owner or owners unknown of the brig *Elpis*." This being a cause of necessities, the claim disclosed on the petition of the plaintiffs filed in this court is founded on bottomree. The second article of the petition set out an instrument which is as follows: [The learned judge here read the instrument.] Now it is clear to me that this is in substance and effect a bottomree bond, and looking to the precedents in this court, it must be so considered. There is great force in the observation of Mr. Clarkson that the rule of merger must be applied in this case because it is admitted that the simple contract debt for necessities could not exist in case of the ship not reaching her destination; and therefore the only contract which the plaintiffs could enforce was a contract arising out of a bottomree bond. It is quite clear that the petition cannot be sustained, and although I am very reluctant in a question *involving [6

⁽¹⁾ 1 Hagg. Ad., 159-179. But see *Bray v. Bates*: 9 Met. American Rep., 287.

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The Rose.

so small a sum to put the parties to further expense, I must not only refuse to allow the petition to be amended as I suggested to Mr. Bruce in the course of the argument, but I think I must reject the petition, leaving the plaintiffs hereafter to take such steps as they may be advised. I also must reject the petition with costs. I shall not interfere with the suit further than by rejecting the petition.

Solicitors for plaintiffs: *Hillyer, Fenwick, & Stibbard.*

Solicitors for defendants: *Ingledew, Ince, & Greening.*

[Law Reports, 4 Admiralty and Ecclesiastical, 6.]

Jan. 21, 1878.

THE ROSE. (6352).

Possession — Mortgage — Jurisdiction to decide as to the Title to a Ship — 3 & 4 Vict. c. 65, ss. 3 & 4 — The Admiralty Court Act, 1861 (24 Vict. c. 10), s. 11.

A British ship was mortgaged by an instrument that was in the form prescribed by the Merchant Shipping Act, 1854, and was duly registered. The mortgagor died intestate, and the mortgagees sold the ship under their power of sale, and executed a bill of sale to the purchaser. By mistake, a receipt for the payment of the mortgage money was endorsed on the mortgage and signed by the mortgagee, and produced to the registrar of shipping, who recorded the same. Afterwards the bill of sale was produced to the registrar, who refused to register it, upon the ground that the property in the ship had vested in the representatives of the mortgagor.

In order to complete the title of the purchaser a suit in *rem* was instituted on behalf of the mortgagees and purchaser, and in such suit the court held it had jurisdiction to grant a decree declaring that the purchaser was entitled to possession of the ship.

This was a cause instituted on behalf of Christopher Dove Barker and William Winship against the ship *Rose*. The ship was arrested, but no appearance was entered. The petition filed on behalf of the plaintiffs was in substance as follows:

1. Before and at the time of the execution of the mortgage security hereinafter mentioned, Thomas Gibson was the sole owner of the British ship *Rose*, belonging to the port of North Shields.

2. In October, 1867, the said Thomas Gibson, being indebted to Messrs. Woods & Co., of Newcastle-upon-Tyne, bankers, in the sum of 1000*l.*, it was agreed by and between the said Thomas Gibson and the said Messrs. Woods & Co., that the said Thomas Gibson should execute a mortgage of the said ship to Christopher Dove Barker, one of the plaintiffs in this case, and one of the partners in the said firm of Woods & Co., as security for the repayment of the sum of 1000*l.*, and such further advances as might be made by the said Messrs. Woods to the said Thomas Gibson.

3. Accordingly on the 8d day of October, 1867, the said ship was mortgaged to the said Christopher Dove Barker to secure the repayment to the said Christopher Dove Barker of the sum of 1000*l.*, and such further advances as aforesaid, together with interest thereon, to be paid at the rate and in the manner therein mentioned.

4. The said mortgage was duly registered at the port of North Shields, on the 7th day of October, 1867.

5. The said Thomas Gibson died in June, 1872, and at the time of his death there remained due and owing on the said mortgage security the principal sum of 1000*l.*, together with a large sum for further advances and interest.

6. The said Christopher Dove Barker being unable to obtain payment of the principal money and interest so due as last aforesaid, in the month of July, 1872, sold the said ship, under the power of sale contained in the mortgage deed, to William Winship, one of the plaintiffs in this cause, for the sum of 800*l.*

7. On or about the 20th day of July, 1872, the said William Winship paid to the said Christopher Dove Barker the said sum of 800*l.*, and the said Christopher Dove Barker, by the direction of the said Messrs. Woods & Co., executed a bill of sale of the said ship to the said William Winship.

8. On the 24th day of July, 1872, the said William Winship signed a declaration, such as is required by the 50th section of the Merchant Shipping Act, 1854 — the said declaration is true, and the said William Winship has always been ready to declare to the truth of the same in the manner by law required.

9. The said William Winship believing that in order to complete his title to the said ship it was necessary that a discharge of the said mortgage should be endorsed on the back of the original mortgage and signed by the said Christopher Dove Barker, requested him to make such endorsement and sign the same.

10. Accordingly the said Christopher Dove Barker, in pursuance of such request as aforesaid, endorsed and signed the said discharge on the back of the said mortgage on the 20th day of July, 1872, and the said mortgage was given by the said Messrs. Woods & Co. to one of their clerks.

11. The said clerk by mistake took the said mortgage to the custom house at North Shields on the 27th day of July, 1872, and produced the same to the registrar, who recorded the said discharge.

12. The said William Winship afterwards presented the said bill of sale and declaration mentioned in the seventh and eighth articles of this petition to the registrar at the Custom House at North Shields, and requested him to register the said bill of sale, but the said registrar refused to register the said bill of sale, upon the ground that the property in the said ship had passed to the representatives of the said Thomas Gibson.

13. The said Thomas Gibson died intestate and insolvent, and no administration of his estate and effects has been taken out.

14. The execution and registration of the said discharge were acts done by mistake, and the said discharge is wholly void at law and in equity.

15. The said William Winship is entitled to be registered as the legal owner of his said ship, but owing to the said mistake he is unable to be registered as the legal owner without the assistance of this honorable court.

*The petition concluded with the following prayer:—The [8 solicitors for the plaintiffs pray the Right Hon. the Judge to pronounce the said William Winship to be the lawful owner of sixty-four sixty-fourth shares of and in the said ship, Rose, and to decree that possession of the said ship, her tackle, apparel, and furniture, be given to the said William Winship as such lawful owner, and that all things may be done to complete his title to the said ship, and that otherwise right and justice may be administered in the premises. It appeared from copies annexed as exhibits to the petition, that the mortgage deed, the bill of sale, and the declaration above mentioned, were drawn up according to the forms prescribed and approved by the Merchant Shipping Act, 1854, and that the discharge endorsed on the mortgage deed was so far as material in the following terms:

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"Received the sum of 800*l.* in discharge of the within written security, dated at Harrogate this 26th day of July, 1872."

The allegations in the petition were proved by affidavits, and it was stated on affidavit that notice of the institution of the suit had been served by the solicitors for the plaintiffs on the next of kin of the mortgagor.

G. Bruce, for the plaintiffs. The court has jurisdiction to grant the prayer of the petition. The 3 & 4 Vict. c. 65 (ss. 3 & 4) confers upon the court authority to decide all questions as to the title to any ship, and by the 11th section of the Admiralty Court Act, 1861, the court is enabled to exercise jurisdiction over any claim in respect of a mortgage duly registered. [SIR ROBERT PHILLIMORE. Ought not administration to have been taken out to the estate of the mortgagor?] The very object of this suit is to avoid the expense and trouble of an administration. The discharge endorsed on the mortgage was a mistake and altogether void. If administration of the estate of the mortgagor were taken out it is clear that his representatives could not, on the facts now before the court, substantiate any claim to the ship. The next of kin of the mortgagor has had notice of this suit, and has not appeared.

SIR ROBERT PHILLIMORE. This is a novel exercise of jurisdiction *on the part of this court, but after giving careful attention to the statutes cited, I am of opinion that the court has jurisdiction, and that the plaintiffs are entitled to a decree in the terms of their prayer. I shall make an order accordingly (¹).

Solicitors for plaintiffs: *Deacon, Son & Rogers*.

(¹) The decree was drawn up in the following form: "The judge having heard counsel on behalf of the plaintiffs pronounced William Winship, of Blyth, in the county of Northumberland, shipowner, one of the said plaintiffs, to be the lawful owner of sixty-four sixty-fourth shares of the ship or vessel *Rose* (official number 24,639) and entitled to be registered as the sole owner thereof, and he decreed possession of the said ship or vessel to be delivered to him the said William Winship accordingly."

[Law Reports, 4 Admiralty and Ecclesiastical, 18.]

March 11, 1878.

[3]

*CARGO EX ARGOS. (6008.)

Contract of Affreightment — Execution of the Contract on the Part of the Shipowner — Inability to deliver Goods arising from the Incapacity of the Goods — Lien for Expenses incurred in preserving Cargo — The County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51) s. 2.

The defendant shipped on board the steamship of the plaintiff in the port of London a number of barrels of petroleum. A bill of lading was given for the goods: it provided that the goods should be delivered at the port of Havre, the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, etc., excepted, unto order or assigns on paying freight. It

further provided that the goods should be taken out within twenty-four hours after arrival, or pay a fixed sum per day demurrage, and a note in the margin stated that the goods were subject to a landing charge of 5 per cent on the amount of freight and primage. The defendant wrote to G., who was the ship's broker at Havre, informing him that the petroleum was to be sent to Rouen, and that he was not to deliver it without production of the bill of lading regularly endorsed, and that the freight and other expenses were to be charged on the goods. The vessel arrived in the harbor at Havre, on the night of the 7th of December, 1870, with the petroleum and other goods on board. Owing to there being at the time a large quantity of war material at Havre, the authorities there would not allow the petroleum to be landed, and would not allow the vessel to remain in the harbor with the petroleum on board. On the morning of the 7th of December the vessel sailed from Havre and proceeded to Honfleur and Trouville, but the authorities at those ports refusing to allow the petroleum to be landed, the vessel returned to Havre on the 12th of December, and in the outer harbor there transhipped the petroleum into a lighter hired on behalf of G. to receive it. The vessel then went into dock, and having discharged the rest of her cargo and shipped a fresh cargo for London, she was obliged by the authorities at Havre to re-ship the petroleum. On the 16th of December she sailed from Havre, and in due course she arrived at the port of London with the petroleum on board. G. was well aware of the various movements of the vessel. The bill of lading for the petroleum was not presented at Havre or elsewhere. The defendant had notice of the petroleum being brought back to London, but he did not take delivery of it. The plaintiff instituted a suit *in rem* against the petroleum:

Held, that the plaintiff was entitled to recover in such suit the bill of lading freight, and the expenses and demurrage incurred in respect of the petroleum at Havre, Honfleur, and Trouville, and freight for the carriage of the petroleum from Havre to London.

Seem, that there was an entire execution of the contract on the part of the plaintiff.

But even if there was not such entire execution, still he was entitled to recover the bill of lading freight, because there was such an execution of the contract as he could effect consistently with the incapacity of the cargo.

Where a master of a ship, in order to preserve cargo, takes measures such as a *wise and prudent man would think most conducive to the benefit of all concerned, the cargo is subject to a lien for the expenses so incurred, and this lien may be enforced by a suit *in rem*, by virtue of the provisions of the County Courts Admiralty Jurisdiction Amendment Act, 1869.

This was a suit instituted in the City of London Court for freight, demurrage, and expenses, on behalf of Jules Gaudet, owner of the steamship Argos, against 147 barrels of petroleum lately shipped on board the steamship Argos by W. Horner Brown.

An appearance was entered on behalf of W. Horner Brown. The parties filed in court a statement of agreed facts which was as follows:

Statement of Agreed Facts.—The plaintiff, who trades under the style of Gaudet Freres, was, in the month of November, 1870, the owner of the British steamer Argos, and of other steamers which were frequent traders between London and Havre, and other ports in the north of France. The defendant, Walter Horner Brown, is a merchant in Billiter Square, dealing in petroleum, oils, chemicals, and other articles, trading as Walter H. Brown and Co.; on the 25th of November he received an order from Messrs. Tuffière and Prudhon, of Rouen, for 200 barrels of pe-

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troleum, to be delivered free on board, in London, and to be sent to Havre as soon as possible. In consequence of this, the defendant, on the same day, sent his clerk to the plaintiff's London brokers (Messrs. Rowell and Racine) to inquire the freight of petroleum from London to Havre and the probable date of sailing of the next steamer, and was informed the freight would be 15s. to 20s. per ton, and the steamer would sail about the end of the week. The defendant thereupon arranged to send 147 barrels of petroleum by such steamer, and the same was shipped on board the Argos on the 5th of December, and the captain gave the defendant the following bill of lading:

"Shipped in good order, and well-conditioned, by W. Horner, in and upon the good steamship called the Argos, whereof is master for the present voyage, 'Richardson,' and now riding at anchor in the river, and bound for Havre, 147 barrels of petroleum.

15] *The goods to be taken out within twenty-four hours after arrival, or pay 10l. 10s. 8 Cwts. qrs. lbs. Freight 1/147 £31 1 3
day demurrage 421 0 9 Primage 3 3 3

Being marked and numbered as in the margin, and are to be delivered in the like good order, and well-conditioned, at the aforesaid port of Havre, the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, machinery, boilers, steam and steam navigation, of whatever nature or kind soever, excepted, unto order or to their assigns, on paying freight for the said goods at the rate of 20s. and 15 per cent primage per ton gross, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to two bills of lading all of this tenor and date, the one of which bills being accomplished, the others to stand void.

"Dated in London, 30th November, 1870.

"Weight and contents unknown. Not accountable for leakage.
"W. J. Richardson."

The said bill of lading was, by direction of the defendant, made out in the name of W. Horner, his two first names.

Upon the 6th of December, the defendant applied to the plaintiff's brokers for the name of the ship's broker at Havre, and was informed it was M. H. Généstal, Rue d'Orleans, Havre. Defendant thereupon wrote him the following letter, which was duly received by Généstal, but of which the plaintiff had no notice:

£34 4 5

Exchange f. 25.40

All goods are subject to a landing charge of 5 per cent on the amount of freight and primage payable au change de f. 25.40.

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"Monsieur H. Généstal, } "11, Billiter Square,
 "78, Rue d'Orleans, Havre. } "6th December, 1870.

"We beg to inform you that we have shipped upon the steamship *Argos*,

Washington, } 147 barrels of spirit of petroleum,
 1/147 } 21, 392 kilogrammes,

to order. These spirits are to be sent to Messrs. Tuffieré and Prudhon, at Rouen, and you must not deliver them to any person unless they present the regular bill of lading endorsed by us.

*"The freight and other expenses are to be charged on the [16 goods. "W. H. Brown & Co.

"Accept, Monsieur, our salutations."

The *Argos* sailed with the petroleum and other goods, being a general cargo, at midnight on the 6th of December, arrived at Havre 10.30 p. m., on the 7th, and, being unable to land the cargo there, the captain proceeded to Honfleur; and being unable to land it there, he took the ship to Trouville, and was informed there he might land it there if he obtained a certificate from the engineer of bridges and ways, resident at Honfleur; and the captain thereupon went to Honfleur, and obtained the following certificate:

"Honfleur, le 8 Décembre, 1870.

"L'Ingénieur Ordinaire de l'Arrondissement du Nord-Est.

"A Monsieur, — L'Ingénieur soussigné a envoyé le steamer *Argos* à Trouville à cause du danger tout particulier en ce moment qu'offre la présence du pétrole sur les quais à côté du matériel de guerre en chargement pour le Havre. Le soussigné a écrit à ce sujet à M. Dubose une lettre qui lui parviendra demain matin et qui indique les précautions à prendre sous le bénéfice de ces précautions et en installant de suite un garde-feu à bord pour empêcher.

"M. Dubose peut faire entrer le steamer *Argos* en bassin ce soir à la marée "E. Arnoux, l'Ingénieur Ord."

"Arrondissement du Nord-Est,

"Ponts et Chaussées, Département du Calvados."

The captain, under this authority, took the ship into the basin at Trouville Deauville, where he remained during the 9th, and was on the 10th compelled to go out of the basin; and the president of the Municipal Commission of Trouville Deauville endorsed on the engineer's authority the following certificate:

"Nous Président de la Commission Municipale de Deauville certifions que nous avons été obligés malgré l'autorisation de monsieur l'Ingénieur d'Honfleur de faire sortir du bassin de Deauville le navire anglais *Argos* chargé de pétrole, la population s'oppo-

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17] sant *au déchargement dudit navire et menaçant de se laisser entraîner à des excès. “(8^d) “Hébert Dérocquett,
 “Le Président de la Commission Municipale,
 “Deauville, 10 Décembre, 1870.” “Le Membre, Délégué.

Upon that the captain went to Honfleur, and the following protest was noted before the British consul there, and the statements therein are to be taken as true:

“Vice-Consulat Britannique à Honfleur.

“By this public instrument of protest, be it known and made manifest unto all whom it doth or may concern, that on the 10th day of December, 1870, before me, British vice-consul for the port and district of Honfleur, voluntarily came and personally appeared William John Richardson, master of the British steamship or vessel, called the Argos, of London, official No. 60,839, of the burden of 109 tons, or thereabouts, then lying in the port of Trouville-sur-Mer, in the consular district of Honfleur, laden with petroleum, who duly noted and entered his protest with me, the said vice-consul, against all losses and charges he incurred for not being allowed to unload his cargo in the port of destination and two other ports, by the local authorities of these ports, and did declare, depose, and say, that he sailed from London on the 6th of December, present month, at midnight, with a cargo of petroleum, in destination for Havre, where he arrived on the 7th, at 10.30 P.M., having the red flag up on account of having petroleum on board, and that early in the morning of the 8th of December the authorities of the port of Havre compelled him to take the ship out of the harbor, as they would not allow him to remain there, having petroleum on board, and in consequence of which he started immediately, at 10.30 A.M., for Honfleur, where he arrived at 11.30 A.M., and having swung the vessel, and was about to make her fast in a position where the pilot told him, he received an order from the harbor master to leave immediately the port, and therefore he did leave, at noon, for the next nearest port, which was Trouville-sur-Mer, and where he arrived at 1.30 P.M. And the said appearer did further declare, that on arriving at Trouville he found a difficulty for the unloading of the petroleum from the [8] port or harbor *master, or principal of the port, who informed him that he would allow him to unload the petroleum if he could obtain a permission from the Ingénieur des Ponts et Chaussées, residing at Honfleur; and in order to hasten the despatch he immediately employed a cab, and started himself with the broker, M. Hébert, to Honfleur, and obtained the required permission; and after which he returned to Trouville, and put the ship in dock next day (Friday, the 9th), waiting

further instructions. And further, that to-day (Saturday, the 10th), he met with some objection from the part of the president of the municipality administrative commission of Deauville Trouville, for the landing of the casks in question; and after having made further steps in the case before other authorities, he had been ordered to leave the port of Trouville as soon as possible, without landing any of the casks of petroleum, and in consequence of which he went to Honfleur at 3 p.m., in order to deposit, note, and enter his present declaration and protest at this vice-consulate with all reserve, to furnish further particulars if required. And therefore, the said William John Richardson, master, did declare to protest, and by these presents, he does solemnly protest against all and every person or persons whom it doth, shall, or may concern, against all loss of time and charges incurred by the above mentioned opposals of landing his cargo he met in these three different ports, and doth declare that all damages for delay or detention, and all losses and charges, are and ought to be borne by the merchants and freightors interested, and reserves for himself and his owner all rights against them. And I, the said Vice-Consul, at the request of said William John Richardson, master of the said steamship Argos, did and do hereby solemnly protest against the same, in the manner and form aforesaid.

"Thus done and protested in the city of Honfleur, at the British vice-consulate."

On the 9th December M. Généstal wrote to the defendant as follows:

"Havre, the 9th December, 1870.

"Messrs. Walter H. Brown & Co., 11, Billiter Square, London.

"Your letter of the 6th I have received to-day only. For some time the entry into the port of Havre has been refused to [19 ships carrying petroleum. I have attempted in vain to discharge the 147 barrels at Honfleur, and been compelled to send the Argos to Trouville, where I hope to be able to disembark it. Rouen has been occupied by the Germans, and I have not yet heard from Messieurs Tuffié and Prudhon. If a judicial sequestrator could be obtained at Trouville, he would take care of the goods, and he would only deliver against presentation of a regular endorsed bill of lading, and after payment of the freight, and all other expenses. I cannot truly comprehend how the buyers at Rouen should have directed this petroleum to go to Havre, since it has been forbidden in the newspapers to discharge such goods here, and that for more than two months.

"Accept, gentlemen, my sincere salutations.

"H. Généstal."

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The plaintiff and defendant were, throughout, personally quite unaware that there was any difficulty in landing petroleum at Havre. The Argos having other cargo in her, Mr. Duprey, on the part of Généstal, hired a lighter, called the Augustine Amélie, in order that the petroleum might be transhipped into her in Havre outer harbor, or the roads, while the Argos went into dock to unload her other cargo; and the following agreement was entered into:

“Havre, le 12 Décembre, 1870.

“Entre le Capitaine Ponetre du sloop français Augustine Amélie d'une part,

“Et M. Généstal, agent du steamer anglais Argos, d'autre part, a été convenu et réglé ce qui suit.

“Le Capitaine Ponetre s'engage à recevoir et garder à son bord jusqu' à Samedi 17 courant 147 fûts essence de pétrole, lesdits fûts à transborder dans l'avant-port ou en rade du Havre à bord du steamer anglais Argos.

“Il est bien entendu que le Capitaine Ponetre gardera son navire à disposition, de manière à ce que transbordement s'opérera sans aucun retard et dès la sortie du pont dudit steamer Argos, moyennant quoi il lui sera à titre de frèt à forfait la somme de deux cent cinquante francs.

“Ponetre.

“Fait double au Havre, 12 Décembre, 1870.”

201 *On Monday, the 12th of December, the Argos arrived in Havre Roads, when the captain found permission had already been obtained to enter the outer harbor, and having entered the outer harbor, he transhipped the petroleum into the lighter. Immediately on the arrival of the Argos in Havre outer harbor, the transshipment of the petroleum into the lighter was commenced, and was finished at 4.30 p.m. on the same day, and at midnight the Argos entered the dock, and was moored alongside the quay, whilst the remainder of her cargo was discharged, and a fresh cargo shipped for London; and, on the 16th, a fresh cargo having been loaded, the Argos came out of dock, and having re-shipped the petroleum, as she was obliged to do by the port authorities at Havre, sailed again for London, where she arrived at 9 a.m. on the 18th of December. During the whole of this time no bill of lading was presented to the captain or officers of the Argos, nor was any request made for the delivery of the goods. In the ordinary course of business petroleum would be delivered on the quay at Havre, on presentation of the bill of lading. In this case it would not have been possible for the captain to have landed on the quay, even if the bill of lading had been presented. M. Généstal was well aware at the respective times that the Argos was in dock and moored

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alongside the quay, and of the various movements of the ship, and of the petroleum having been put on board the lighter. By reason of the hereinbefore mentioned circumstances the plaintiff was put to the following expenses:

At Havre	72.85	} £24 16s. 10d.
" Honfleur	85.75	
" Trouville	118.85	
Hire of Sloop	810.	
Labor transshipping petroleum .		
Captain and Seamen's traveling expenses	24 5	} £5 0 0
Broker's expenses, &c.		

And he also claims the following amount of freight:

Freight to Havre	24 4 5
Freight back to London	24 4 5

*And he also claims five days' demurrage for the detention [21 of the Argos whilst engaged in traveling from port to port, which, at 10*l.* 10*s.* per day, as per bill of lading, amounts to 52*l.* 10*s.* and she also consumed on her extra journeys five tons of coal, which, at 18*s.* per ton, amounts to 4*l.* 10*s.*

On the 16th of December Messrs. Rowell & Racine, the brokers in London for the Argos, wrote Messrs. W. H. Brown & Co. the following letter:

" 90, Lower Thames Street, London, 16th December, 1870.
" Messrs. W. H. Brown & Co.

" Dear Sirs — Some few days ago we heard that the 147 barrels of petroleum that you shipped per Argos, for Havre, had been landed at Trouville. We now hear that this is a mistake, the authorities there having at the last moment refused to allow it to be landed. The captain, therefore, took it back to Havre, where he had to charter a sailing vessel to take charge of it, while he took his ship into port to load (not being permitted to go in with it on board). We expect the Argos back shortly with the 147 barrels on board, and give you notice of the facts at once, so that you may make any arrangements you consider necessary.

" The expenses incurred will, we fear, be enormous, and amount (with the freight) to about 120*l.* or 130*l.*

(" Signed)

" Rowell & Racine."

But to which they had no reply. And in accordance with that letter Messrs. Rowell & Racine gave notice to Messrs. Brown & Co. of the arrival of the Argos with the said petroleum on board by the following memorandum:

1878

Cargo ex Argos.

Memorandum.

“(Private.)

“Rowell & Racine,

“90, Lower Thames Street,

E. C.

“19th December, 1870.

“W. Horner,

“Messrs. W. H. Brown & Co.,

“Billiter Square.

“The Argos, Captain Richardson, from Havre, has arrived, having on board the undermentioned goods belonging to you.

“Washington, 1/147 . . . 147 barrels petroleum.”

22] *In reply, Messrs. W. H. Brown & Co. sent the following letter:

“From Walter H. Brown & Co.,

“11, Billiter Square, London, E. C.,

“19th December, 1870.

“To

“Messrs. Rowell &

“Racine.

“Seeing that you have failed to fulfill your engagement to deliver 147 barrels of petroleum at Havre, according to bills of lading for same in our possession, we herewith enclose you invoice for this lot, amounting to 240*l.* 10*s.* 2*d.*, and shall feel obliged by a check for the amount at your earliest convenience. We are buyers of this article at the present time, and although the market has dropped we shall be happy to treat with you for the purchase of the 147 barrels you have, as you inform us, brought back to London, per Argos; of course, at landing gauges.

“Walter H. Brown & Co.”

And inclosed in their letter was the following invoice:

“Messrs. Rowell & Racine, } “11, Billiter Square, London.

“To Walter H. Brown & Co. } “19th December, 1870.

“Washington, 1/147 . . . 147 barrels petroleum spirit.

“Net gallons, 5,382, at 11*d.* per gallon . . . £246 13 6

“Discount, 2½ per cent . . . 6 8 4

£240 10 2

And Messrs. Rowell & Racine, in reply to that letter, sent the following letter:

“90, Lower Thames Street, London, E.C.,

“December 20, 1870.

“Messrs. W. H. Brown & Co.

“Gentlemen — We have your favor of yesterday, and in reply beg to say that, as you are well aware that it was through no act of the ship's that the goods were not landed at Havre, we can hardly imagine that your claim is intended seriously.

" Nevertheless, as you seem inclined to dispute our claim, we *beg to give notice that unless it is settled before three [23 o'clock (3 o'clock) this afternoon, we shall place the matter in the hands of our solicitor, and instruct him to proceed at once to recover the full amount of our account as rendered, and, further, the costs of lighterage of the goods from the ship to the wharf.

" We are, gentlemen, Your obedient servants,
Rowell & Racine."

Messrs. W. H. Brown & Co. not having paid by the time mentioned, the goods were taken to Plaistow Wharf, and there lodged to the plaintiff's order; and the attorneys for the plaintiff, Messrs. Cattarns & Co., instituted a suit *in rem* under the admiralty jurisdiction of this court against the said 147 barrels of petroleum. An appearance was entered to that suit by Messrs. Heather & Co., attorneys, and shortly afterwards they, on behalf of Messrs. W. H. Brown & Co., applied to the plaintiff's attorneys to release the goods and deliver them to the said W. H. Brown & Co. Whereupon the said Heather & Co., put in bail to answer damages and costs in this suit, and a delivery order was accordingly given, and the said goods were duly delivered to W. H. Brown & Co.; and in order to obtain the delivery of their said goods they had to pay the wharf charges and expenses consequent upon the said goods being landed at Plaistow Wharf.

Agreed on plaintiff's behalf,
Cattarns, Jehu & Cattarns, 33, Mark Lane, E.C.,
Plaintiff's attorneys.

Agreed on defendant's behalf,
Heather, Son & Gill, Paternoster Row,
Defendant's attorneys.

On the 4th of January, 1872, the case was heard, on the above statement of facts, by Mr. Commissioner Kerr, who, on the 15th of January, gave judgment for the plaintiff for 135*l.* 5*s.* 8*d.*, the full amount claimed. Against this decision the defendant appealed to the Court of Admiralty, and the appeal came on for argument on the 7th of May, 1872.

* *The Admiralty Advocate* (Dr. Deane, Q.C.), and *Murphy*, [24 for the appellant. The respondent is not entitled to recover the freight, because he did not deliver the goods according to the terms of the bill of lading, and never was ready to deliver them: *Osgood v. Groning* ⁽¹⁾; *Appleby v. Myers* ⁽²⁾; *Notes to Culler v. Powell* (Smith's Leading Cases, vol. 2, p. 1); *Notes to Pordage v. Cole* (1 Notes to Saunders by Williams, p. 548); *Taylor v.*

⁽¹⁾ 2 Camp., 466.

⁽²⁾ Law Rep., 2 C. P., 651.

1873

Cargo ex Argos.

Caldwell ⁽¹⁾; *Maclachlan on Shipping*, p. 394. The respondent was bound to deliver the goods at the usual place of discharge in the port of Havre, that is, at the quay, and until he delivered the goods there he did not perform his contract. The fact that the performance of the contract by the respondent was rendered impossible by the French authorities cannot render the appellant liable to pay freight which has not been earned: *Parodine v. Jane* ⁽²⁾; *Spence v. Chodwick* ⁽³⁾; *Atkinson v. Ritchie* ⁽⁴⁾; *Barker v. Hodgson* ⁽⁵⁾; *Sjoerds v. Luseombe* ⁽⁶⁾; *Blight v. Page* ⁽⁷⁾; *Evans v. Hutton* ⁽⁸⁾. The restriction imposed by the French authorities was temporary only, and the respondent ought to have waited until the restriction was removed: *Hadley v. Clarke* ⁽⁹⁾. The appellant can only be rendered liable for the freight, the return freight, or expenses, by virtue of a contract other than that contained in the bill of lading, to be implied from the conduct of the parties. But there are no circumstances to raise any such implied contract: *Vlierboom v. Chapman* ⁽¹⁰⁾; *The Soblomsten* ⁽¹¹⁾; *The Teutonia* ⁽¹²⁾.

Milward, Q.C., and *Day*, for the respondent. The contract was performed on the part of the respondent, and the freight was earned when the Argos arrived with the goods on board at the port of Havre; certainly the contract was fully performed when the goods were discharged in the outer harbor, the place appointed by the local authorities. There was no obligation on the respondent to deliver the goods at any particular part of the port. 25] All that the respondent *engaged to do was to carry the goods to the port of Havre and to deliver the goods over the ship's side; the respondent was ready and willing to deliver the goods, and, in fact, did deliver the goods according to the directions of Généstal, the agent of the appellant: *Duthie v. Hilton* ⁽¹³⁾; *Ford v. Cotesworth* ⁽¹⁴⁾; *Geipel v. Smith* ⁽¹⁵⁾. But should the court be of opinion that the respondent failed to perform his contract, he is still entitled to maintain this suit, because, if there was any failure of performance on his part, it arose from the "incapacity of the goods" and from the default of the appellant or his consignee. The appellant ought to have known of the existence of the restriction at Havre, and it was his duty to make provision for the landing of the goods: *Adams v. Royal*

⁽¹⁾ 3 B. & S., 826; 32 L. J. (Q.B.), 164.

⁽²⁾ *Aleyn*, 26.

⁽³⁾ 10 Q.B., 517; 16 L.J. (Q.B.), 313.

⁽⁴⁾ 10 East, 530.

⁽⁵⁾ 3 M. & S., 267.

⁽⁶⁾ 16 East, 201.

⁽⁷⁾ 3 B. & P., 295, (n).

⁽⁸⁾ 4 M. & G., 954.

⁽⁹⁾ 8 T. R., 259.

⁽¹⁰⁾ 13 M. & W., 230.

⁽¹¹⁾ Law Rep., 1 A. & E., 293.

⁽¹²⁾ Law Rep., 3 A. & E., 394; Law Rep., 4 P. C., 171.

⁽¹³⁾ Law Rep., 4 C., P., 138.

⁽¹⁴⁾ Law Rep., 4 Q. B., 127; Law Rep., 5 Q. B., 544.

⁽¹⁵⁾ Law Rep., 7 Q. B., 404.

Mail Steam Packet Co. (1); *Kearon v. Pearson* (2). The appellant was not ready to accept delivery. The principle laid down by Lord Stowell in *The Fortuna* (3), and *The Friends* (4), is applicable to the present case: *The Felix* (5). As to the expenses and the return freight, all that was done was done with the sanction of Généstal, the appellant's agent. The master of the Argos, when he found the appellant was not ready to accept delivery, did the best he could for the interests of the appellant, the owner of the goods, and the appellant is liable to pay the expenses so incurred, as well as the return freight: *Christy v. Row*. (6)

Murphy, in reply, cited *Brown v. Tanner* (7); *Galliffe v. Bourne*. (8) It appears, from the note in the margin of the bill of lading, that the goods were to be landed by the respondent.

Cur. adv. vult.

March 11, 1873. SIR ROBERT PHILLIMORE. This is a cause of appeal from the City of London Court, arising out of an agreement made for the use or hire of the ship Argos, under the 32 & 33 Vict. c. 51, s. 2. I regret to say that I derive no assistance from the *judgment of the court below, which is in these [26 words: "As I understand you are going to appeal in this case, all I shall say is, that I give judgment for the plaintiff. The amount, I believe, is agreed at 135*l.* 5*s.* 8*d.*." It appears to me that the reason here assigned for not stating the grounds of a judgment involving important questions of law is based upon a very mistaken view of the duty of a judge of the court of first instance, and deprives the appellate court of the assistance which it has a right to expect. All the material facts of this case are admitted. [His lordship, after stating the facts as agreed, proceeded:] The plaintiff claims for freight out, demurrage, freight back, and expenses, the sum of 135*l.* 5*s.* 8*d.*, for which he has recovered judgment in the court below. The defendant contends in substance that the plaintiff never performed his contract of carrying the petroleum to the usual place of delivery at Havre, which he asserts to be the quay; that as the plaintiff was never ready to give delivery at the agreed place the defendant was not obliged to take the goods; and that at all events, though neither plaintiff nor defendant were holden to blame for the non-delivery, the contract was unexecuted, and no right of action could accrue to either party. The bill of lading contains the two stipulations: 1, That the goods are to be taken out within twenty-four hours after arrival, or pay demurrage; and 2, that

(1) 5 C. B. (N.S.), 492; 28 L. J. (C.P.), 83.

(2) Law Rep., 2 A. & E., 273.

(3) 1 Taunt., 300.

(4) 7 H. & N., 386; 81 L. J. (Ex.), 1.

(5) Law Rep., 2 Eq., 806; Law Rep., 3 Ch., 597.

(6) Edwards, 56.

(7) Edwards, 246.

(8) 4 Bing. N. C., 314; 3 M. & G., 648.

1870

Cargo ex Argos.

they are to be delivered at the port of Havre. Under this contract it was the duty of the defendant to take out the goods, and of the plaintiff to bring the goods to the port of Havre, where they could be taken out. Indeed, it is one of the admissions in the case that the captain could not have landed them on the quay. I think that when the ship, on her first arrival at Havre, went under the direction of Généstal to Honfleur and to Trouville, she had performed the duty of bringing the goods to the port, and was exonerated from the necessity of waiting a longer time than she did; and in any case I think that, upon the second occasion, when she actually did deliver the goods on board the lighter, there was an entire execution of the contract, and the shipowner became entitled to his outward freight and his de-
27] murrage up to that time. *But if this opinion be erroneous, and there was not an entire execution of the contract, I should still be of opinion that the shipowner was entitled to his freight, because, to borrow the reasoning of Lord Stowell in *The Fortuna* (¹), there was such an execution as he could effect consistently with the incapacity under which the cargo labored. The shipowner had done his utmost to consummate the contract; it did not lie with him that the contract was not performed; it was stopped by the incapacity of the cargo.

It remains to consider that part of the claim which relates to the return freight and certain incidental expenses. In the first place, I am of opinion that Généstal must be considered as acting on behalf of the owners of the cargo; he was present and aware that the petroleum was reshipped. In the second place, it must be remembered that the authorities at Havre had power to compel the master to take the cargo on board. In these circumstances, what was the duty of the master of the ship? He was obliged to take the goods out of the territorial waters of France. Would he have acted properly if he had then thrown them overboard? I should have said on principles of common sense and justice he could not take this course; and I feel myself strengthened by the opinion of Sir James Mansfield, no inconsiderable authority, and himself expressing the opinion of the Court of Common Pleas in the case of *Christy v. Row* (²): "Where a ship is chartered upon one voyage, outwards only, with no reference to her return, and no contemplation of a disappointment happening, no decision which I have been able to find determines what shall be done in case the voyage is defeated: the books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned. But it appears to be wholly voluntary; I do not know that he

(¹) *Edwards*, 56(²) 1 Taunt., at p. 315.

is bound to do it; and yet, if it were a cargo of cloth or other valuable merchandise, it would be of great hardship that he might be at liberty to cast it overboard. It is singular that such a question should at this day remain undecided." And though this judgment was delivered in 1808, I have been unable to find a further *explanation of this subject. If, however, [28 the master had not this duty of necessary agent to the cargo thus re-shipped after delivery, and it was competent to him to have thrown the goods overboard, he is *a fortiori* entitled on restoring them to the owner to a lien upon them for the expenses of their preservation; and the proceeding *in rem* in a court having admiralty jurisdiction is the mode which he has adopted for enforcing that lien. I think, therefore, that the plaintiff is entitled to recover the return freight and the incidental expenses. I wish to observe that I have consulted the cases, for reference to which I am indebted to the industry of counsel, though I have not thought it necessary to advert to more than those I have mentioned. I think I should also say a word as to the delay in the adjudication of this case. It is due to the following cause: After the argument, and while I was considering my judgment, the Court of Common Pleas prohibited a county court from exercising jurisdiction in a case of this description. I was unable to agree with the judgment of the Common Pleas; but for reasons which I have before stated, I thought myself bound to obey it, and as my jurisdiction in these matters is purely appellate, to dismiss the suit for want of jurisdiction; but I gave leave to appeal to the Privy Council, suggesting that if they took the same view as I did, they might think themselves warranted in coming to a different decision from that of the Common Pleas. This they have done, and have remitted the cause to the jurisdiction of this court ⁽¹⁾. I affirm the decree of the court below, and dismiss the appeal with costs.

Solicitors for appellant: *Heather & Sons*.

Solicitors for respondent: *Catlarns, Jchu, & Catlarns*.

[Law Reports, 4 Admiralty and Ecclesiastical, 20.]

Jan. 21, 1873.

*THE *ÆOLUS*. (6069.)

[29

Salvage — Pilotage.

A Dutch bark was riding at anchor off Deal, and waiting to proceed down Channel, and a waterman who, though not a licensed pilot, was in the habit of piloting vessels, was taken on board her, under an arrangement whereby he was to receive 7s. a day, with 5s. in addition, for navigating the vessel as pilot until

(1) See Law Rep., 3 A. & E., 508.

The *Æolus*.

she arrived off Beachy Head. The day after the waterman came on board, and whilst the bark was still at anchor, a gale came on, and the tempestuous state of the weather caused the vessel to drive, and rendered it necessary to slip the chain, when under the direction of the waterman the vessel was taken through the Gull Stream and brought up in safety in Margate Roads.

In a salvage suit instituted on behalf of the waterman and other persons who had rendered services to the vessel, the court *held*, that the services rendered by the waterman were within the scope of his contract, and that he was not entitled to claim as a salvor.

THIS was a salvage suit instituted on behalf of Henry Caspell and George Porter, of Deal, mariners, and others the owners and crews of the luggers Seaman's Glory and Tiger against the bark *Æolus*, her cargo and freight, to recover salvage reward for services rendered under the circumstances noticed in the judgment.

Jan. 17. *The Admiralty Advocate* (Dr. Deane, Q.C.), and R. E. Webster, appeared for the plaintiffs.

Butt, Q.C., and E. C. Clarkson, for the defendants.

The following authorities were referred to in addition to those cited in the judgment: *The Duke of Manchester* ⁽¹⁾, *The General Palmer* ⁽²⁾; *The Enterprise* ⁽³⁾; *The Columbus*. ⁽³⁾

Cur. adv. vult.

Jan. 21. SIR ROBERT PHILLIMORE. In this case the vessel to which the services were rendered was of considerable value — the agreed value of the ship, freight, and cargo being 40,000*l*. On the 16th of January, 1872, the *Æolus*, a Dutch bark, was riding by her starboard anchor close to the Deal Bank Buoy, and about a mile from the South Brake Buoy, waiting to proceed down channel. She was in want of a pilot, and her master engaged George Porter, one of the plaintiffs, who came 30] on board on the 16th, and agreed *to assist in navigating the bark as pilot until her arrival off Beachy Head, for the sum of 7*s*. a day whilst on board her, and the sum of 5*l*. in addition. Porter was not a licensed Trinity House pilot, but he was a waterman who often acted as pilot. The bark remained at anchor until the 17th, when it came on to blow a whole gale from the S. to S.S.W., and the vessel began to drive. Her master, who was examined as a witness, and appeared to be a person competent to command the vessel, conferred with Porter, and they agreed that the best course to pursue was to slip the anchor. They also agreed that a signal should be made for a boat to come off to the bark to take a message ashore for an anchor and chain to supply the place of the anchor and chain they were about to slip. The lugger Seaman's Glory accord-

(1) 2 W. Rob., 470; 6 Moore's P. C., 90.

(2) 2 Hagg. Adm., 176.

(3) 2 Hagg. Adm., 178, n.

ingly came off, and Henry Caspell, another of the plaintiffs, was put on board the bark with some difficulty. Caspell was put on board because Porter, fearing that his orders might not be understood by the foreign crew, wished to have some one on board with him who had a thorough knowledge of the English language, and also to have some one acquainted with the navigation who could assist in looking out for the buoys. The chain was then slipped, and Caspell went forward to look out for the buoys, while Porter directed the navigation of the vessel, and the bark was taken through the Gull Stream, and was brought up in safety on the evening of the 17th in Margate Roads. In the meantime the lugger *Seaman's Glory* went to Deal for the anchor and chain, but being herself too small to bring them off to the bark, for they were of large size, a larger lugger called the *Tiger* was engaged, and brought the anchor and chain alongside, and her crew got them on board the bark. This service was rendered with some peril to those on board the *Tiger*, and damage to the extent of about 40*l.* was done to the lugger herself, a fact which proves the danger to which the lugger was exposed. Two of the crew of the *Tiger* were injured while getting the anchor on board—one in the head and one in the knee—by the swinging of the anchor occasioned by the lurching of the lugger. I have no hesitation in pronouncing, and in fact it was admitted by the counsel for the defendants, that Caspell and the owners and crews of the two luggers are entitled to recover as salvors. Indeed, having regard to the tempestuous state of the *weather, and the dangerous vicinity of the Brake Sand, and [31] the manner in which the anchor and chain were brought out, I am of opinion that the services rendered by these plaintiffs were highly meritorious, and that the court ought to reward them with a liberality proportioned to the value of the property. The total sum that I shall award is 280*l.* The distribution of this sum leads the court to consider the legal question whether the services of Porter are to be considered as salvage services, or as pilotage services only. There is one point preliminary to this question, which I must now consider. It was strongly pressed upon me, in the first instance, that Porter was not a licensed pilot, but only a waterman; but I think, on principle, this fact can make no difference. Porter took upon himself to discharge the duties of a pilot, and cannot throw off the character he assumed. My opinion on this point is confirmed by the decision of Lord Stowell in the case of *The Michael*.⁽¹⁾ That learned judge there refused to allow the claim of fishermen taken on board as pilots in the channel to be rewarded as salvors, observing that they were engaged as pilots, and if they assumed that

(1) Referred to in the case of *The Columbus* (2 Hagg. Adm., 178, n.)

1873

The *Æolus*.

character, they ought to adopt the rules and be remunerated according to the rates of that service. On the authority of this case I conclude that whatever the law is as to pilots, that law is applicable to the plaintiff Porter. I am of opinion that it would be extremely dangerous to allow the general rule that pilots cannot claim as salvors to be too easily violated; the exceptions to this rule should be few and clearly defined. It ought to be well understood that the services of a pilot are not slightly to be converted into salvage services. I find this opinion strengthened by the authority of cases decided in this court. The case of *The Frederick* (*) is an example falling within one class of cases which have established an exception to the general rule. In that case Dr. Lushington said: "It has been urged in the argument for the owners, that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time it is to be observed that it is a settled doctrine of this court that no pilot is bound to go on board a vessel in distress to render pilot service 32] vice for mere pilotage reward. *If a pilot, being told he would receive pilotage only, refused to take charge of a vessel in that condition he would be subjected to no censure, and if he did take charge of her he would be entitled to a salvage remuneration." Another class of cases establishes the proposition that a pilot, although he may have been originally employed as a pilot to render pilotage services to a vessel not in distress, may yet recover salvage reward, provided circumstances supervene to alter the character of the service. But the present case does not fall within either of these exceptions. The vessel was not in distress at the time when the pilot went on board, and the subsequent circumstances were not such as to require him to act in any other capacity than that of a pilot. He displayed local knowledge and the peculiar skill of a pilot, and thus brought the vessel in safety to an anchor in Margate Roads, but such knowledge and skill he contracted to apply; so that the services rendered by him were strictly within the scope of his contract. Before leaving this point I will call attention to the case of *The Joseph Harvey* (‡), where Lord Stowell said: "It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage, properly so called, for it is possible that the safe conduct of a ship into a port under circumstances of extreme danger and personal exertion may exalt a pilotage service into something of a salvage service. But in general they are distinguishable enough, and the pilot, though he contributes to the safety of the ship, is not to claim as a legal salvor." That seems to me sound doctrine, to which I mean to adhere. After thus

(*) 1 W. Rob., 16.

(‡) 1 C. Rob., 306.

reviewing the facts, I am bound to pronounce that they do not bring Porter's case within the exceptions, which would give him the right to claim salvage in this court, and I therefore reject his claim. I shall distribute the sum I have awarded as follows: To the Seaman's Glory I awarded 70*l.*; to Caspell, 30*l.*; to the owners of the Tiger, for the damage sustained, 40*l.*; and in respect of the salvage services of the Tiger I award 140*l.*, out of which sum double shares must go to the two injured men.

Solicitors for plaintiffs: *Lowless, Nelson, & Jones.*

Proctor for defendants: *C. Waddilore.*

[Law Reports, 4 Admiralty and Ecclesiastical, 33.]

Jan. 14, 1873.

*THE ANTILOPE. (6240.)

[33

Salvage—Pleading.

In a suit instituted on behalf of the owners, master, and crew of a steam tug, to recover salvage reward for salving a disabled vessel and her cargo, it appeared by the petition that persons other than the plaintiffs in the cause had assisted in the service, and in an article in the answer filed on behalf of the owners of the salved vessel and her cargo, the defendants alleged that they had been ordered by a court of competent jurisdiction to pay to such other persons the sum of 240*l.*, in respect of the assistance so rendered by them.

The plaintiffs moved to strike out this article. The court holding that the article was relevant to the matters in issue in the suit rejected the motion.

THIS was a cause of salvage instituted on behalf of the owners, master and crew of the steam tug, City of London, against the screw steam ship, Antelope, and her cargo. The petition alleged, among other things, that the Antelope having received damage by collision with another vessel in the East Bay of Dungeness, was making water very fast when the City of London fell in with her. The City of London accompanied the Antelope towards the shore, and the Antelope was put ashore at the west end of the Roar Bank. At the request of the master of the Antelope, the City of London remained by the Antelope during the night, and at daybreak the City of London, and a lugger called the Galatea, which had come up, assisted to lighten the Antelope forward. When a portion of the cargo of the Antelope had been taken from her forehold, the City of London took her off the sand and ultimately towed her to Dover in safety. The 5th, 6th, and 12th articles of the answer filed on behalf of the owners of the Antelope and her cargo, were as follow:

5. A small portion of the cargo of the Antelope was placed on board the City of London. The City of London was unable to take any more cargo on board, and such of the rest of the cargo as was taken out of the Antelope was placed on board certain smacks or luggers named the Galatea, Friend to all Nations, Three Sisters, and General Blucher, whose owners, masters, and crews instituted suits, to obtain rewards for their services, in the Court of Admiralty of the Cinque Ports.

6. Before the events next hereinafter stated the Antelope had been boarded by

Mr. William Grant, clerk to Messieurs Latham & Company, of Dover, French consular agents, and by two chief boatmen of the coast-guard, with their crews and a large number of laborers, who were employed in transshipping the cargo ; 34] *the said Mr. William Grant and the said chief boatmen consulted with and gave the benefit of their advice and local knowledge to the master of the Antelope, and they or one of them gave all the orders and directions to the master of the City of London.

12. The defendants in this suit have been decreed by the judge of the Court of Admiralty of the Cinque Ports to pay to the plaintiffs in the suits in the 5th article mentioned, the sum of 240*l.* ; and they are further under liability to the said chief boatmen of the coast-guard and their crew, and to the laborers, in the 6th article mentioned, for their services as hereinbefore stated.

R. E. Webster, on behalf of the plaintiffs, moved to reject the 12th article of the answer. The amount due to the plaintiffs in this suit must be determined without regard to the sum awarded to other salvors. The *Due Checchi* ⁽¹⁾ is on all fours with the present case.

W. G. F. Phillimore, for the defendants. The *Due Checchi* is distinguishable from the present case. It was there sought to bring under the notice of the court events which had happened out of court, and to plead against the owners of the cargo a compromise made by the owners of the ship. But the article objected to in the present case states that a court of competent jurisdiction has awarded a certain sum to be paid out of the proceeds of the property saved. This is a matter of which the court must take cognizance ; because, in considering the value of the property for the purpose of the present case, the court must consider the charges imposed upon the property. By the decree of the Court of Admiralty of the Cinque Ports, the value of the property saved is reduced by 240*l.*

Webster, in reply.

SIR ROBERT PHILLIMORE. I cannot accede to this application to strike out the 12th article of the answer ; nor do I think that in retaining it I shall run counter to my decision in the *Due Checchi* ⁽¹⁾. In that case it was pleaded that a certain sum of money had been paid to the salvors out of court. But in the present case some salvors not parties to the suit now before the court have instituted suits in another court of competent jurisdiction, and have recovered salvage reward in that court. I think it has been correctly stated by Mr. Phillimore, that when the time comes for me *to consider what amount I shall [35 award to the plaintiffs in this suit, I must take into account the net value of the property saved, and it is therefore proper that I should know that out of the proceeds of the property a sum of money has been ordered to be paid by a court of competent jurisdiction. I must dismiss the motion with costs.

Solicitors for plaintiffs : *Lowless, Nelson, & Jones*.

Proctors for defendants : *Dyke & Stokes*.

⁽¹⁾ See note, p. 35.

CHANCERY APPEAL CASES

(Including Bankruptcy and Lunacy Cases)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEALS IN CHANCERY.

[Law Reports, 8 Chancery Appeals, 338.]

L. C. and JJ., Jan. 30, 1873.

*GIACOMETTI v. PRODGERS.¹

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[1871 G. 51.]

Wife's Equity to a Settlement — Sufficient Maintenance — Marital Rights.

On a marriage in 1862, the parties having no property, no settlement was made; but the husband, at the wife's request, gave up an appointment producing more than £300 a year. In the same year the wife's mother settled funds producing about £1000 a year on the wife for life, for her separate use, with remainder to the children, giving the husband £200 a year for life after the death of his wife; and shortly afterwards she gave the wife a further income of above £700 a year for her separate use. The wife allowed the husband £100 a year till 1865, when they ceased to live together. In December, 1870, he obtained a decree for restitution of conjugal rights, and a separation deed was thereupon executed by which she agreed to give him an annuity of £300 a year, and to maintain their two children while with her, his rights as to her unsettled property not being affected. At this time the wife had saved about £8000 out of her separate income. It appeared that the husband was not to blame in the disputes. A sum of £8000 having devolved upon the wife under the intestacy of a relation:

Held (affirming the decree of *Malins*, V.C.), that the wife was not entitled to any settlement out of this sum.

THIS was an appeal by the plaintiff, Mrs. Giacometti, from a decision of Vice Chancellor Malins. The plaintiff, who was the daughter of a wealthy lady, but had no property of her own, intermarried in London, on the 15th of February, 1862, with the defendant Giacometti, who also had no property; but, at his wife's request, gave up an appointment in one of the Austrian Lloyd's ships bringing him in between £300 and £400 a year. No settlement was made. On the 9th of November, 1862, the wife's mother settled funds, producing about £1000 a year, upon trust to the plaintiff for life, for her separate use, and after her decease for children, the husband taking nothing but £200 a year for life after the death of his wife. In December, 1862, the mother appointed to the wife, for her separate use, a life interest in a fund producing more than £700 a year.

(¹) Affirming 3 Eng. Rep., 726.

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The plaintiff did not allow her husband to interfere with her income, but until 1865 allowed him £100 a year. In 1865 they separated, and had never since lived together. There were two 339] *children of the marriage, who were entirely supported by the plaintiff. Some time after this the husband instituted a suit for the restitution of conjugal rights, and in December, 1870, obtained a decree. To avoid the decree being enforced, the plaintiff, by a deed of separation of the 9th of February, 1871, agreed to pay him £300 a year during their joint lives, and if he survived her, £100 a year during the remainder of his life, and to provide for the maintenance and education of the children while left with her. It was provided by the deed that nothing contained in it should affect any right of the husband in respect of the money to which she was entitled as one of the next of kin of Laura Blades, or in respect of any other property to which she might become entitled. At the time of this agreement the plaintiff had saved out of her separate income about £6000, which she charged with the payment of the annuity to the husband. It appeared from the evidence of the plaintiff's own brothers that the plaintiff was the person in fault in the disagreements between her and her husband. The plaintiff filed her bill in this suit to enforce her equity to a settlement out of £6000, to which she had become entitled as one of the next of kin of Laura Blades. Vice Chancellor Malins dismissed the bill with costs (*).

Mr. *Karslake*, Q.C., and Mr. *Willis*, for the appellant, distinguished the case from *Spicer v. Spicer* (*), *Aguilar v. Aguilar* (*), and *In re Erskine's Trust's* (*), and contended that the wife was entitled to a settlement unless the husband had made a settlement upon her; *Macqueen's* husband and wife (*).

Mr. *Glasse*, Q.C., and Mr. *Shebbearc*, for the husband, were not called upon.

LORD SELBORNE, L.C.: It has been very rightly admitted by Mr. *Karslake* that these are cases eminently of discretion—a discretion to be exercised upon judicial principles which have 340] reference to the law on which the *rights of the parties are founded. By law the husband is entitled to his wife's personal estate not settled to her separate use. On the other hand, by law he is under the obligation of discharging the duty, or at least of being willing to discharge the duty, of maintaining her and her children. In this particular case the husband was a poor gentleman, a foreigner, an officer in the public service of his country, dependant at the time of his marriage upon his

(*) Law Rep., 14 Eq., 253.

(*) 24 Beav., 365.

(*) 5 Madd., 414.

(*) 1 K. & J., 302.

(*) 2d Ed., p. 89.

professional income. The wife, though not herself at that time a rich lady, was the daughter of a very rich mother. The husband made no settlement on his wife, and he was not in a position in which it was possible for him to do so—that the wife well knew—but it is admitted that at the instance of the wife he gave up his whole means of living. In that state of things, within a year of the marriage the wife's rich mother settled on her, with remainder to her children (subject to a reversionary life annuity of £200 a year to the husband), the sum of £33,333 consols—in substance £1000 a year; and shortly afterwards in the same year she gave the wife, under a power, a life interest in about £26,000 consols. The lady, therefore, is admitted to have, subject to such concessions as she has since made in her husband's favor, a present life income of, in round numbers, £1700 a year.

The children, who have no equity except through their mother, have settled upon them £1000 a year at all events; and in addition to what I have mentioned the wife, finding her fortune more than ample for all her purposes hitherto, has saved out of it a sum of more than £6000, and there is nothing to lead to the conclusion that further saving may not hereafter go on. It appears that the husband and wife did not live happily together. I do not go into the merits or demerits on either side, only it seems due to the husband to observe that the vice chancellor, who examined the evidence on the subject, and whose statement as to the effect of the evidence is not challenged as inaccurate, considered (and it appears that even the wife's nearest relatives were of opinion) that no blame was to be cast on him. The husband was willing and desirous to live with his wife, and took proceedings for restitution of conjugal rights. He obtained a decree for that purpose, and would have enforced it but for an agreement of separation, the effect of which was to make the wife's savings a security to the *husband for an income [341 which, taking into account what he would have in reversion under the mother's settlement, would be £300 a year during his life, the wife maintaining her children as long as he chose to leave them with her, but he being under no obligation to continue to do so, and not renouncing his paternal rights; and this instrument, deliberately executed by the wife in order that she might purchase the right of living apart from her husband and be released from the decree for restitution, contains an express agreement that the provision thereby made for the husband shall not in anywise restrict or abridge any right, title, or claim of the husband in respect of the fund which is now in controversy. Now that fund is £6000. The vice chancellor, in the exercise of his discretion, has thought that under these circumstances the

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principle laid down by Sir John Leach in *Aguilar v. Aguilar* (¹), and followed in *Spicer v. Spicer* (²) and *Re Erskine's Trusts* (³), applies. Sir John Leach said, in *Aguilar v. Aguilar*, that no part of the fund there in controversy (though I think the husband became insolvent) was to be settled on the wife, "because she had an ample separate provision for maintenance secured to her by settlement, as well as further separate provision under the will of a relation," adding that the principle upon which this court gave such a provision out of property of this description against the husband when he deserted the wife (which this husband has not done), and against his general assignee in case of bankruptcy or insolvency (events which in this case have not happened), was, that the law, when it gave the wife's property to the husband, imposed upon him the obligation of maintaining her, and if he failed in that obligation, either by the desertion of his wife or by his inability to assist in her support, this court would fasten that obligation upon the property itself; but that this principle did not apply where the wife had secured to her a competent separate maintenance. Here the wife has secured to her much more than a competent separate maintenance, and the husband is placed by the effect of his marriage in a worse position, with respect to his maintenance, than he otherwise would be, and it is at the instance of his wife that he is not in possession of his marital rights, which were ordered to be restored to him, and the 342] restoration of which to him would practically give *him the benefit of her income, even though settled to her separate use without power of anticipation. I am of opinion that, under these circumstances, the vice chancellor wisely and properly exercised his discretion by dismissing the bill.

SIR W. M. JAMES, L.J.: I am of the same opinion. The bill, in my judgment, was from the first a hopeless bill, and the appeal is an idle appeal which has caused an unjustifiable waste of the public time.

SIR G. MELLISH, L.J., concurred.

Solicitors: Dr. Zimmerman; Messrs. Gray, Johnston, & Mounsey.

[Law Reports, 8 Chancery Appeals, 342.]

L.C. and L.JJ., Dec. 5, 1872. Feb. 17, 1873.

HARRISON V. HARRISON.

[1868 H. 233.]

Administration — Marshalling — Scotch Descended Estates — Lex Loci rei sita — Costs.

A testator domiciled in England died possessed of personal estate and also of real estates in Scotland. His will purported to deal with the Scotch real estates,

(¹) 5 Madd., 414.

(²) 24 Beav., 365.

(³) 1 K. & J., 302.

but was inoperative to pass them, and they descended to the Scotch heir. A suit having been instituted for the administration of the testator's estate against the executors, one of whom was the Scotch heir, he elected to take the descended estates in opposition to the will, and gave up the legacy which had been bequeathed to him by the will :

Held, first, that the liability of the Scotch real estates to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of Scotland, and not by the law of the country where the testator's estate was being administered :

Secondly, that as the law of Scotland threw the general debts primarily on the personal estate, and did not permit them to fall, directly or indirectly, on the real estate until the personal estate was exhausted, there could be no marshalling in the English Court against the Scotch heir in favor of the pecuniary legatees :

Thirdly, that no part of the general costs of the suit could be thrown on the Scotch estates ; and that the heir was entitled to his costs out of the personal estate except the extra costs occasioned by his election.

Decision of the master of the rolls reversed.

**Semble*, that if the real estate had been situate in England, the costs of the [343 suit, which, under the circumstances, would have been confined to the administration of the personal estate, ought not to have been thrown on the real estate.

THIS was an appeal from a decision of the master of the rolls. W. Harrison, who was domiciled in England, by his will, dated the 18th of February, 1868, after directing the payment of his debts, funeral and testamentary expenses, and making divers pecuniary and specific bequests, and devising certain freehold estates in England, devised to his son William Harrison his estate called Gullielands, in the county of Dumfries, in Scotland, and also the sum of £2000. He also gave other estates in Scotland and pecuniary legacies to his son James Harrison and his daughter Margaret Harrison, the plaintiff, and an estate called Heckegirth, in Scotland, to his trustees upon the trusts therein declared for the benefit of his daughter Amelia Irving and her family. And he gave and devised all the residue of his real and personal estate to his wife and children equally, as tenants in common. The testator appointed the plaintiff, his two sons, and the defendant C. E. Edwards, his trustees and executors.

The testator died on the 14th of March, 1868, leaving four children, of whom the defendant W. Harrison was his eldest son and heir-at-law. Margaret Harrison, the widow, died on the 30th of March, 1868. The bill was filed for the administration of the real and personal estate of the testator. In the course of the suit W. Harrison became aware of the fact, of which he was previously ignorant, that the will, having come into operation previously to the commencement of the Titles to Land Consolidation Act (Scotland) (31 & 32 Vict. c. 101), was ineffectual to pass real estate in Scotland. He accordingly claimed all the Scotch real estates of his father, as heir-at-law. The master of the rolls held that it was competent to him to elect to take the Scotch estates in opposition to the will,

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although he had previously received his legacy of £2000, which he was accordingly ordered to refund. His lordship also directed that the legacy repaid by the heir-at-law should be applied in compensation of the persons disappointed by the heir's election and that as no part of the personal estate was undisposed of, the testator's debts, funeral and testamentary [344] expenses, and the costs *of the suit, should be primarily paid out of the descended Scotch estates ⁽¹⁾.

From this decision the defendant *W. Harrison* appealed.

1872. Dec. 5. The appeal came on to be heard before the lord chancellor and the lord justices.

Mr. *Millar*, and Mr. J. T. *Anderson*, for the appellant: If this had been English real estate the court would not have made it liable to the costs, for it is *dehors* the will, although the court may make it liable to debts, because it is by law already subject to debts. *Stringer v. Harper* ⁽²⁾ illustrates this. In *Row v. Row* ⁽³⁾ an opinion is intimated that there is a jurisdiction in the case of a trust which does not exist when the legal estate descends. But whatever may be the rule as to English estates descended the court can have no power to charge the Scotch estates with debts or costs: *Drummond v. Drummond* ⁽⁴⁾; *Elliott v. Lord Minto* ⁽⁵⁾; *Carron Iron Company v. Maclaren* ⁽⁶⁾; The heir is liable in the Scotch tribunals for his application of the real estate, and there is no evidence that the Scotch courts would allow payment of general debts or costs of an English Chancery suit out of Scotch realty. [They also referred to *Davies v. Topp* ⁽⁷⁾ and *Haslewood v. Pope* ⁽⁸⁾.]

Mr. *Anderson*, Q. C., and Mr. *Graham Hastings*, for *James Harrison* and the trustees of *Mrs. Irving*. The legacy which is brought [345] back must go to satisfy the disappointed *devisees. If the estate had been English the order of liability to debts would be that laid down in *Jarman on Wills* ⁽⁹⁾; *Seton on Decrees* ⁽¹⁰⁾; and it is reasonable that the costs should follow the same rule as the debts: *Row v. Row* ⁽³⁾.

The equity of marshalling is not confined to creditors; if they

⁽¹⁾ 1872. March 4.

THE MASTER OF THE ROLLS, in giving judgment, said that the rule on which he had for many years acted as to the distribution of assets was as follows: In payment of debts the personal estate undisposed of was first applicable, then the real estate specifically devised for payment of debts, then the real estate descended, then the residuary real and personal estate devised and bequeathed by the will, then the pecuniary legacies, and then the real and personal estate

specifically devised and bequeathed *pro rata*. The costs of the suit, in his opinion, were payable out of the assets in the same order.

⁽²⁾ 26 Beav., 585.

⁽³⁾ Law Rep., 7 Eq., 414.

⁽⁴⁾ 6 Bro. P. C., 601.

⁽⁵⁾ 6 Madd., 16.

⁽⁶⁾ 5 H. L. C., 416.

⁽⁷⁾ 1 Bro. C. C., 524.

⁽⁸⁾ 3 P. Wms., 322.

⁽⁹⁾ 8d Ed. vol. ii, p. 588.

⁽¹⁰⁾ 8d Ed., p. 817.

have been paid out of a fund applicable to legacies, the legatees can go against the fund out of which they ought to have been paid: Williams on Executors (¹). Then the fact that this is Scotch estate makes no difference. Foreign real estate is treated as assets to pay debts: Williams on Executors: (²); *Noell v. Robinson* (³). The case of *Trotter v. Trotter* (⁴) shows that Scotch law has no application except in determining whether the will passes the Scotch estates. The suit was a proper administration suit, and the costs are the first charge on the personal estate.

Mr. Fry, Q.C., and Mr. Waller, for the plaintiff.

Mr. Roxburgh, Q.C., Mr. Southgate, Q.C., Mr. Fischen, Q.C., and Mr. Forster for other parties.

LORD SELBORNE, L.C.: We are clearly of opinion that it is necessary to ascertain the law of Scotland as applicable to the questions raised in this case. On that point we are not really at variance with any opinion expressed by the master of the rolls, because his lordship's attention was not called to that view of the question, the case being argued before him as if the real estate had been English. We feel, however, bound to say that, taking the order of the master of the rolls as referring only to English descended estates, and putting out of consideration the particular costs connected with the exercise by the heir of his election, it does not appear to us to be a true result either of principle or of the English authorities that the costs of the general administration of the personal estate would have been thrown on the real estate in favor of legatees, upon the principle of marshalling. *But as this is not a case of de- [346] scended English estate it is not possible to determine the question until we have information concerning the law of Scotland as bearing on the subject. In our judgment all questions as to the burdens and liabilities of real estate situate in a foreign country, in the absence of any trust or personal contract (which might make a difference), depend simply upon the law of the country where the real estate exists. Here there is no question of trust or personal contract at all. It must depend therefore upon the *lex loci rei sitæ*, and upon nothing else. Then the sole question is what is the form of inquiry that ought to be directed, because we think that if it should turn out that by the *lex loci rei sitæ* Scotch real estate under the control and power of the heir-at-law, who is properly a party before the court, is liable to be applied in payment of debts in the administration of the general estate according to the proper equities, those equities ought to be worked out in this suit. The matters to be inquired into in substance are these; first, whether by the law of Scot-

(¹) 6th Ed., vol. ii, p. 1582.

(²) 6th Ed., p. 1539.

(³) 2 Vent., 358.

(⁴) 3 Wils. & Sh., 407.

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land the Scotch descended heritable estate is liable to the payment of any, and which, of the debts of this testator; and, if it be so, whether by that law it is liable primarily or in exoneration of the personal estate, having regard to the fact that the pecuniary legatees will be wholly or partly unpaid if it be not so applied.

SIR W. M. JAMES, L.J., and SIR G. MELLISH, L.J., concurred.

A case was accordingly submitted for the opinion of the lord advocate (Mr. *George Young*) and Mr. *A. B. Shand*, and their opinions, verified by affidavit, were read at the further hearing of the appeal. The opinion of the lord advocate was as follows:

1. According to the law of Scotland, the whole property of a party deceased, heritable as well as movable, is liable for his debts, including funeral expenses. But in a question between the heir and the executor the heritable estate is primarily liable for heritable debts — that is, debts heritably secured — and the personal estate for personal debts; so that either paying in the first instance debts for which he is not primarily liable is entitled to ultimate relief against the other. The heritable estate [347] is not primarily *liable for personal debts, and is not liable at all for testamentary expenses; and the executor paying personal debts has no claim for relief against the heir, unless he has paid in excess of the whole personal estate under the administration. In no case can he claim relief from the heir of testamentary expenses. 2. By the law of Scotland all personal debts must be paid out of the personal estate before all legacies, and a deficiency to answer legacies cannot be claimed, directly or indirectly, from the heir, and must be met by an abatement from the legacies. I give this answer without reference to the act of 1868, which has altered the law in some respects, but does not apply to the present case.

Mr. *A. B. Shand's* opinion was to the same purport.

1873. Feb. 17. On this day the further hearing of the appeal took place before the lord chancellor and Lord Justice Mellish.

Mr. *Millar*, and Mr. *J. T. Anderson*, for the appellant: The opinions of two eminent Scotch lawyers, which have not been disputed by the other side, show that by the law of Scotland the descended real estate is not primarily liable to the debts of the testator, and can only be applied in their payment if the personal estate is insufficient. Therefore by no process of marshalling can it be made liable for the benefit of the legatees, whether pecuniary or specific. The case must be governed by the *lex loci rei sitæ*, otherwise the effect would be, that this court would be creating a charge upon the real estate to which by the

law of the country it is not subject. With respect to the costs, the Scotch estates are entirely beyond the scope of the English administration, and ought not to bear any of the costs of the suit.

Mr. *Anderson*, Q.C., and Mr. *Graham Hastings*, for the defendant James Harrison and the trustees of Mrs. Irving: The opinions of the lord advocate and Mr. Shand correctly represented the Scotch law in the case of a testator domiciled in Scotland, and whose assets are being administered in Scotland. But here the administration is taking place in England, and the rights of the parties must be determined by the law of the *country [348 where the *concursum creditorum et legatorum* is: Story's Conflict of Laws ⁽¹⁾; *Balfour v. Scott* ⁽²⁾; Williams on Executors ⁽³⁾. With respect to the costs, the heir was a necessary party to the suit in that capacity: and the court has jurisdiction to make him pay costs. The testator included the Scotch estate in his will, and it is therefore equitable that it should bear its share, at least, of the cost of interpreting and executing the will.

Mr. *Fry*, Q.C., and Mr. *Waller*, for the plaintiffs.

Mr. *Roxburgh*, Q.C., Mr. *Southgate*, Q.C., Mr. *Fischer*, Q.C., and Mr. *Forster* for other parties.

LORD SELBORNE, L.C.: I am not sorry that we have heard some further argument upon the question; but what we have now heard has confirmed us in the opinion which we previously expressed. The doctrine of marshalling as applied in favor of legatees against heirs-at-law taking descended real estates in England is part of the *lex loci* of England affecting those real estates, and no question of conflict of law can arise under those circumstances. It is a wholly different thing when persons who have an interest in the personal estate only, endeavor indirectly to establish in their own favor, or for their own relief, a burden upon real estate situate in another country, which, by the law of that country, would not be administered so as to give them what they ask. I think, upon the evidence before us, it is perfectly clear that although this testator was domiciled in England, yet if Scotland had been the forum of administration, the Scotch real estate would not have been liable in relief of these legatees. I use the expression "liable in relief" advisedly, because without saying that it makes really any difference whether the creditors have been actually paid or unpaid, there being a fund in court belonging to the personal estate applicable to their payment, yet, as a matter of fact, I understand that in this case the rights of creditors are altogether out of the question. They have been paid, and paid out of a fund which by the law both of England and *Scotland is liable to their payment in [349

(1) 6th Ed. § 523.

(2) 3 Paton's Sc. App. C. 300.

(3) 6th Ed. p., 1401.

priority to the rights of these legatees. The legatees ask that by virtue of the English doctrine of equity applicable to the administration of English real estates descended when personal legatees would be disappointed by the payment of creditors out of their fund, these legatees may be declared entitled to acquire the rights of creditors against the Scotch real estate. It is clear that in Scotland they would have no such right, and to me it seems equally clear that unless they have such a right in Scotland the law of England cannot give it to them. It is admitted as I understand, that the burden of liability to debts, so far as relates to real estate, can only be created by the *lex loci rei sitæ*; but it is suggested that the burden may be laid on real estate on which it is not imposed by the *lex loci rei sitæ* by an indirect equity in favor of the legatees, because the creditors who have been paid might have pursued their own rights against the real estate without waiting, in the first instance, to see whether there was personal estate or not. It seems quite impossible that this can be correct, because, in the first place, as against the real estate in Scotland the courts of England have no jurisdiction at all. Any jurisdiction which they can exercise as to the real estate in Scotland can only be through the medium of some personal equity attaching to the owner in Scotland of that real estate, who, in this case, is the Scotch heir. What is that personal equity? There is no fiduciary relation. What right have these legatees, upon the footing of personal equity, to say that the heir shall not enjoy the Scotch real estate as the law of Scotland gives it to him, or that any burden shall directly or indirectly be thrown upon that real estate in their favor, which would not be imposed by the law of Scotland? It seems to me quite clear that this court cannot found any such equity upon the accident of this heir-at-law being before it as a party to the suit. The equity must be founded upon some higher principle. The fallacy which pervaded the whole of Mr. Anderson's argument was this, that he assumed that the Scotch estate was properly brought into this court as the forum of administration. But without first showing what this court has to do with respect to the Scotch real estate, and why it ought to be done, the proposition is not made out. There are, in point of 350] fact, *no debts to be paid out of the Scotch real estate; there are no trusts to be executed as to the Scotch real estate; there is no contract to be enforced as to the Scotch real estate; and unless this point is settled in Mr. Anderson's favor, that the indirect burden is to be thrown upon the real estate in Scotland in favor of these legatees, which is the very matter of controversy, it is not here in the proper forum of administration. Therefore, for these reasons, it appears to me we must

discharge so much of the order of the master of the rolls as relates to the payment of debts out of this Scotch real estate.

Then comes the question of the costs of the suit. Generally speaking, the proposition might be safely laid down that if the heir of a Scotch real estate is brought before the court, and it turns out that the court has nothing to do with the real estate in Scotland, and has nothing to do with the heir in any other character, not only no part of the costs can be thrown on that Scotch real estate, but the heir will be entitled to his costs out of the personal estate, for the sake of which he is brought here; and, so far as the conditions which I have stated are applicable to this case, I think the result should follow that the Scotch real estate should be exonerated from the costs, and the heir should have his costs. But those conditions are not applicable here without exception. The heir was also an executor, and although he may not have had his attention drawn to the state of the law and the state of the facts, yet I must impute to an executor, for the purpose, at all events, of dealing with the costs, the knowledge of the duty which he has to discharge. He, without the least impropriety of intention or conduct, received out of this estate £2000 as a legacy, which it turns out he was not entitled to receive unless he elected to give up the Scotch real estate which he elected to retain. Out of that state of things some inquiries arose, and some expense was incurred, and the question is, whether the expenses of those inquiries which related to that question of election, so far as the expense has not been already provided for, ought to be thrown, in favor of the heir, upon the general personal estate? We think it ought not. We think that the heir should bear his own costs of the inquiry as to the subject of election and incident thereto, but that in other respects he *should have* [351] costs out of the personal estate like the other parties to the suit.

SIR G. MELLISH, L.J. : I am of the same opinion.

Solicitors for the plaintiff: Messrs. *Deane & Chubb*.

Solicitors for the defendants: Messrs. *Combe & Wainwright*; Messrs. *Emmet & Son*.

[Law Reports, 8 Chancery Appeals, 351.]

L. C. and L. JJ. Jan. 30, 31; Feb. 18, 1873.

JERVIS v. BERRIDGE.

[1872 J. 63.]

Statute of frauds — Written Agreement with Terms omitted — Rescinding Agreement — Offer in Bill.

The plaintiffs agreed to purchase an estate from the L. Society, and to pay a deposit on the signing of the contract. Before it had been signed the plaintiffs

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verbally agreed with B. to make it over to him on certain terms. In order to enable B. to deal with the L. Society, the plaintiffs signed and gave to him a memorandum, making over the contract to him in consideration of his paying to the L. Society the deposit, and engaging to pay a certain sum to the plaintiffs: the other terms of the bargain between the plaintiffs and B., which were in favor of the plaintiffs, being at B.'s request omitted from the memorandum. On the same day the contract between the plaintiffs and the L. Society was signed, and the part signed by the L. Society was given to B., who paid the deposit. B. afterwards repudiated all the stipulations in favor of the plaintiffs which had not been inserted in the memorandum. The plaintiffs then filed their bill against B. and the L. Society, asking to have the memorandum between B. and the plaintiffs cancelled, and for a conveyance from the society on payment of what was due to them.

Held, (affirming the decision of *Malins*, V.C.), that a demurrer by B. was not sustainable on the merits, for that the memorandum was only ancillary to the verbal agreement between the plaintiffs and B., and any use of it by B. for a purpose inconsistent with that agreement was fraudulent:

Held, further, that if the plaintiffs could have maintained a bill for specific performance of the parol agreement between them and B., on the ground that it had been in part performed, as to which *quære*, they were not bound to do so; but that, as B. had repudiated that agreement, they were entitled to fall back on their original rights under the agreement with the L. Society:

Held, further (differing from *Malins*, V.C.), that the bill was not demurrable for want of an offer to repay to B. what he had paid to the society.

THIS was an appeal by the defendant Berridge from an order of Vice-Chancellor Malins overruling a demurrer.

352] *The substance of the bill, which was filed against Berridge and the Law Life Assurance Society, was as follows: In the latter part of 1871 the plaintiffs negotiated with the Law Life Assurance Society for the purchase of the Martin and O'Malley estates in Galway and Mayo, which the society, who had been mortgagees of them, had purchased on a sale under the Encumbered Estates Act. An agreement was come to for the sale to the plaintiffs at the price of £230,000, of which £10 per cent was to be paid to the vendors on signing the contract, the form of which was agreed upon. During the negotiation the plaintiffs incurred considerable expense in surveys, and entered into contracts for the purchase of various small properties which lay interspersed with the estates. The plaintiffs required an advance of money to enable them to pay the deposit, and in November, 1871, the defendant Berridge agreed to lend them £27,000 for two months, for which he was to receive a bonus of £5000.

On the 15th of November, 1871, the solicitors of the society wrote to the plaintiffs that unless the contract was signed and the deposit paid within seven days the negotiation must be considered to be at an end.

The plaintiffs communicated the purport of this letter to Berridge, with a view of hastening him in the advance of the money, but he, seeing that the plaintiffs were in a difficulty, resolved to avail himself of it to secure for himself a share in the speculation, and first asked to have one-third, then, this having been

acceded to, he asked for two-thirds. Par. 17 stated that ultimately, on the 17th of November, when it was too late for the plaintiffs to apply for an advance elsewhere, he informed them that he would have no partnership, but would purchase the whole for himself. To induce the plaintiffs to agree to this he offered the following terms: that he would pay the plaintiffs £2000; that he would pay all the liabilities which the plaintiffs had incurred with engineers, contractors, solicitors, and others, in connection with the estate; that with reference to the smaller purchases made by the plaintiffs, he would take over all or such of the contracts as the plaintiffs might wish, and relieve the plaintiffs from all liability in respect of the contracts so taken over; that the management of the estates should remain in the hands of the *plaintiff Jervis at a minimum salary of £1000 [353 per annum, with a suitable residence on the property; and that Jervis should, in addition, be entitled to receive a share of the profit to arise from the undertaking, the amount of such share to be left to Berridge. Par. 18 stated that the plaintiffs, having no choice, consented to these terms, and Jervis suggested to Berridge that a formal agreement should be drawn up for carrying out the arrangement. Berridge replied that it was unnecessary to consult a solicitor, and that he would draw up a short memorandum of agreement himself.

Par. 19. "In order that the defendant R. Berridge might go to the directors of the defendant society, and cause his name to be substituted as purchaser of the estates for the names of the plaintiffs, he required a memorandum transferring the benefit of the contract to him. It was unnecessary for this purpose that the other terms of the said agreement between the plaintiffs and the defendant R. Berridge should be stated in the memorandum, and the defendant Berridge was anxious that they should not appear on the memorandum which he intended to take to the directors. Accordingly, on or about the 18th of November, 1871, the defendant R. Berridge produced to the plaintiffs a short form of memorandum, which the plaintiffs have since discovered that he had caused to be prepared by his solicitors, and at his request the plaintiffs, who had no legal advice or assistance, signed the same."

Par. 20 set out the memorandum thus signed, which was a simple transfer to Berridge of the agreement with the society in consideration of Berridge paying to the society the deposit of £23,000, and agreeing to pay the plaintiffs £2000 on the completion of the purchase. The plaintiffs at the same time signed and gave to Berridge a contract for purchase of the estates by them from the society according to the form which had been agreed upon between the plaintiffs and the society.

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21. "It was well understood and recognized by the defendant R. Berridge, when he requested the plaintiffs to sign the said memorandum (as the fact was), that the same did not in fact contain the whole of the agreement between the parties, and in fact the other terms of the said agreement were referred to at the very interview between the plaintiffs and the said defendant 355] at *which the said memorandum was signed, and the plaintiffs signed the same in order to assist the defendant R. Berridge in dealing with the defendant society, and in the full confidence and on the faith that he would perform on his part and carry into effect the other terms of the said agreement which were omitted from the said memorandum."

Berridge, on the 20th of November, 1871, paid the £23,000 to the society, handed over to them the contract signed by the plaintiffs, and received a contract signed on behalf of the society. The bill then proceeded to allege that Berridge repudiated those terms of the agreement which had not been reduced into writing, and to state various instances in which he had refused to comply with them.

On the 17th of January, 1872, the plaintiffs sent to the society a formal notice not to convey to Berridge, as the plaintiffs were about to file a bill against him in reference to the purchase. The bill alleged that it was contrary to equity that Berridge should obtain the entire benefit of the plaintiffs' contract with the society, and at the same time be allowed to repudiate the terms upon the faith of which the plaintiffs signed the memorandum and transferred the contract to him, and that, inasmuch as Berridge fraudulently refused to perform the other terms of the agreement, and the same could not therefore be carried out in its integrity, the memorandum ought to be delivered up to be cancelled. The original bill, filed on the 10th of June, 1872, prayed 1, that it might be declared that, under the circumstances, the plaintiffs were not bound by the memorandum, and that Berridge was not entitled to the benefit thereof, and that it might be delivered up to be cancelled; 2, that in the meantime the society, their trustees and agents, might be restrained from conveying or otherwise dealing with the estates.

On the 22d of June, 1872, the purchase was completed and the estates conveyed to Berridge, who on the same day re-conveyed them to the society by way of mortgage. The bill was amended by stating this fact, and it prayed 1, that it might be declared that, under the circumstances, the plaintiffs were not bound by the memorandum of agreement, and Berridge was not entitled to the benefit thereof, and that it might be delivered up 355] to be cancelled; *2, that it might be declared that the society were trustees, for the plaintiffs, of the estates agreed to be sold

by them to the plaintiffs, and that, upon payment by the plaintiffs to the society of what was due to the society under the contract between them and the plaintiffs, the society might be ordered to convey the estates to the plaintiffs free from the mortgage, and that Berridge might be ordered to join in the conveyance for the purpose of releasing all his right or title (if any) in the premises; 3, that in the meantime the society, their trustees and agents, and Berridge and his agents, might be restrained from conveying, mortgaging, or otherwise dealing with the estates, or any part thereof. To this amended bill Berridge put in a general demurrer for want of equity, which was overruled, with costs, by Vice Chancellor Malins, who at the same time stated that the bill was defective in containing no offer to repay to Berridge what he had paid to the society; and that, if the demurrer had been on that ground alone, he should have allowed it with leave to amend. Berridge appealed. Immediately after the demurrer had been overruled the plaintiffs amended their bill, by inserting a statement that they had always been, and still were, ready and willing to repay Berridge the £23,000, and thereby offered to repay the same; and that they had always been willing to perform the agreement with Berridge in its integrity, but that Berridge had by his conduct rendered its performance impossible.

The *Solicitor-General* (Sir G. Jessel), and Mr. *Freeling*, for the appellant: We demur on two grounds: on the merits and on the defect of the bill in containing no submission to pay. On the merits, we say that the Statute of Frauds is a bar to relief, for the court cannot give a plaintiff relief on the ground of parol agreements varying a written agreement: *Lord Irnham v. Child* ⁽¹⁾; *Lord Portmore v. Morris* ⁽²⁾. Where there are parol terms varying the agreement in writing, relief can only be given on the ground of part performance, fraud, or mistake. A parol term which has been omitted from the written agreement may be set up by way of defense, but *cannot be used by a [356] plaintiff: *Martin v. Pycroft* ⁽³⁾. There was no fraud here; the written agreement was used only for the purpose for which it was given. It may be that Berridge was afterwards advised that he was not bound to carry into effect the parol terms, but that is not fraud: *Wood v. Midgley* ⁽⁴⁾. If the plaintiff is entitled to any relief here it must be by way of specific performance, on the ground that there was an agreement partly performed, though not wholly reduced into writing: *Clifford v. Turrell* ⁽⁵⁾; but he cannot have that relief on the present bill, which prays

⁽¹⁾ 1 Bro. C. C., 92.

⁽²⁾ 2 Bro. C. C., 218.

⁽³⁾ 2 D. M. & G., 785, 795.

⁽⁴⁾ 5 Ibid., 41.

⁽⁵⁾ 1 Y. & C. Ch., 138.

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to have the agreement rescinded. Then, in form, the bill is demurrable for want of an offer to pay: *Godbolt v. Watts* ⁽¹⁾; *Mason v. Gardiner* ⁽²⁾; *Whitmore v. Francis* ⁽³⁾; *Toulmin v. Reid* ⁽⁴⁾; *Langton v. Waite* ⁽⁵⁾. [Mr. Glasse, Q.C., referred to *Clarke v. Tipping* ⁽⁶⁾, *Barker v. Walters* ⁽⁷⁾, and *Colombian Government v. Rothschild* ⁽⁸⁾.]

Mr. Glasse, Q.C., Mr. Davey, and Mr. Daw, appeared for the respondent, but the court adjourned the case to consider whether they should be called on.

Feb. 17. LORD SELBORNE, L.C., delivered the judgment of the court: The argument for the demurrer in this case was rested on two grounds: 1. That on the merits the plaintiffs had not stated facts entitling them to any relief; 2. That they had not, by their bill, offered to repay to the demurring defendant certain sums paid by him to the Law Life Society, which they will be bound to repay if they succeed in obtaining the relief asked for. The latter of these objections has ceased to be of practical importance in this case since the order of the vice-chancellor overruling the demurrer, because the bill has been 357] re-amended and *now makes this offer, which was before omitted; and if the objection were valid, liberty to amend would, as of course, have been given. But the point is one of importance to the general practice of the court, and as it has been insisted upon before us (probably as affecting costs) we think it right to decide it. Upon principle there appears to be no good reason why a plaintiff in equity, suing upon equitable grounds, should be required to offer, on the face of his bill, to submit to those terms which the court, at the hearing, may think it right to impose as the price of any relief to which he may be entitled. Such an offer, if made, might be rendered nugatory at, or at any time before, the hearing, by the plaintiff dismissing his own bill; and, if it were not made, the power and duty of the court to make the relief, if any, which it might grant at the hearing, conditional upon proper terms, would be exactly the same. For this purpose no submission on the part of the plaintiff is necessary, and, if it were, it might properly be implied, if from no other part of the bill, from the ordinary prayer for general relief; which must at least mean that the plaintiff is desirous that everything which is necessary for the purposes of the relief which he expressly prays, may be done. A contrary view would be attended with many difficulties. In some cases a plaintiff may not correctly foresee the terms which the

(1) 2 Anstr., 543.

(2) 4 Bro., C. C., 436.

(3) 8 Price, 616.

(4) 14 Beav., 499.

(5) Law Rep., 4 Ch., 402.

(6) 4 Beav., 588.

(7) 8 Ibid., 92.

(8) 1 Sim., 103.

court may think it equitable to impose upon him; in others, those terms may themselves form the whole, or part, of the matters in controversy between the parties. It would be strange if a bill were demurrable for not offering those terms, the right of the defendant to which it might expressly (though erroneously) controvert without being demurrable. The solicitor-general did indeed suggest, as a reason for the rule for which he contended, that it would enable a defendant to stop a suit before the hearing, by offering the plaintiff all that he asked upon the terms which justice might require. But there are many cases (as *c. g.* where a bill prays that the rights of all parties, under instruments of doubtful construction or effect, may be ascertained and declared) in which it would be impossible for a defendant to stop a suit by offering to submit to a decree in the very terms of the prayer; and it is by no means evident why, if the relief asked were so certainly and necessarily conditional upon particular terms, *as must be assumed by a demurrer to the [358 bill for not offering those terms, the right of a defendant to stop the suit by an offer, on those terms, of the whole relief prayed, should be less effectual than in any other case in which the defendant might offer substantially the whole relief which the plaintiff might be able to obtain by bringing his suit to a hearing, though not in the precise words of the prayer. If the question of terms is one which ought to be determined at the hearing, and not upon a motion to stay proceedings, I should say, upon the same principle, that it is one which ought not to be determined upon demurrer. The authorities appear to me to be consistent with this view. I confess I was surprised to hear the argument that, in such a case as the present, an offer, upon the face of the bill, to repay the moneys expended by the demurring defendant, was necessary; my impression, during many years of practice at the bar, having always been to the contrary. In that impression, as to what is, at least, the modern practice of the court, I am confirmed by several of the authorities which were mentioned at the bar, particularly by those referred to by Mr. Glasse at the close of the argument. There are, indeed, certain cases where a defendant has incurred forfeitures or penalties, or where the controversy relates to usurious or other unlawful transactions, in which the whole *locus standi in curiâ* of the plaintiff is dependent on an election, which must be declared by the bill, to forego legal rights for the sake of equitable remedies. There are other cases, as of suits by mortgagors against mortgagees, in which the plaintiff has no right to sue the defendant at all, except for the purpose of redemption; and if he does not, expressly or in substance, offer (or rather ask) to redeem, he is not *reclus in curiâ*. All these cases stand on

principles of their own, and furnish no rule when those principles do not apply. The technical objection, therefore, must, in my opinion, be overruled. The argument upon the merits of the present bill remains to be considered.

The object of the bill, as amended, is to obtain specific performance of a contract in writing between the plaintiffs and the Law Life Assurance Society, signed between those parties on the 18th of November, 1871, for the sale by the society to the plaintiffs of certain valuable estates in Ireland, and to prevent 359] the demurring *defendant Berridge from having the benefit of that contract under an instrument of the same date, signed by the plaintiffs, and purporting to be a transfer thereof. This is the substance of the relief prayed for. The main averments of fact, upon which the plaintiffs' case rests, are those contained in the 17th and four following paragraphs of the amended bill. [His lordship here stated the substance of those paragraphs.] According to the view which I take of the effect of these statements, the only real agreement between the plaintiffs and the demurring defendant alleged by the bill is the verbal one mentioned in paragraph 17; and the written document signed by the plaintiffs and purporting to be a transfer was not (as in *Lord Irnham v. Child* ⁽¹⁾, *Martin v. Pycroft* ⁽²⁾, and other cases of that class) a contract valid and operative between the parties, but omitting (designedly or otherwise) some particular term which had been verbally agreed upon; but was a mere piece of machinery obtained by the demurring defendant from the plaintiffs, as subsidiary to and for the purposes of the verbal and only real agreement, under circumstances which would make the use of it for any purpose inconsistent with that agreement dishonest and fraudulent. In this state of things, there being a valid contract in writing between the Law Life Society and the plaintiffs, the performance of which is sought to be intercepted by the demurring defendant by reason of this instrument, though he had, many months before the filing of the original bill, repudiated and refused to perform the verbal agreement, on the faith of which (according to these statements) that document was given — the only question is, whether, if all these statements prove to be true, the plaintiffs will be entitled at the hearing to the relief which they ask, or to any part of it? I have no doubt whatever that they will, upon proper terms, be so entitled, if the defendants do not, by answer or otherwise, displace this case.

The solicitor-general argued that the bill was an attempt either to enforce a verbal contract contrary to the Statute of Frauds, or to vary, in the plaintiffs' favor, the effect of a written

(¹) 1 Bro. C. C., 92.

(²) 2 D. M. & G., 785.

contract by the introduction of terms agreed upon by parol and designedly *omitted from the writing. In my view of [360 the bill, it asks neither of these things. It certainly does not ask for specific performance of the verbal agreement which has been repudiated by the defendant. It does not seek to enforce any hybrid agreement, compounded of the written instrument and some terms omitted therefrom; but it asks the court to say that, under the circumstances alleged, the written instrument does not constitute such a binding contract between the plaintiffs and the defendant Berridge as can be allowed to be set up in equity by Berridge, to prevent the performance, in the plaintiffs' favor, of the contract between themselves and the Law Life Society. To the question so raised the Statute of Frauds (which is a weapon of defense, not offense, and which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties) is wholly irrelevant.

Mr. *Freeling*, on the other head, argued (citing *Clifford v. Turrell* ⁽¹⁾, before Vice Chancellor Knight Bruce) that the signature of the written document in this case might operate as a part performance of the parol agreement, so as to entitle the plaintiffs to specific performance of the entire parol agreement against the defendant Berridge, and that the plaintiffs, not asking for such relief, had mistaken their remedy. I do not think it necessary to decide whether the plaintiffs could, on the ground thus suggested, have successfully sought specific performance of the parol agreement; but I am of opinion that, considering the repudiation of that agreement by the defendant Berridge, and the lapse of time after that repudiation before the original bill was filed, they were certainly not bound to do so; and that they were entitled (acquiescing in the view that the parol agreement could not be enforced) to fall back upon their original rights, under the contract between themselves and the Law Life Society. It is scarcely necessary to add, that the conveyance of the purchased estate by the Law Life Society to Berridge, after the original bill was filed (to which they were both defendants), can make no difference in this case. Whatever Berridge takes by that conveyance, he takes subject to all the equities which the plaintiffs had against the Law Life Society. He stands so far, for the purpose of *the subsequent proceedings, in [361 their shoes; and his own proper case against the plaintiffs cannot be made better or worse by reason of that conveyance. The appeal must be dismissed with costs.

Solicitors: Messrs. *Hunter, Gwatkin, & Hunter*; Messrs. *Syms & Son*.

(¹) 1 Y. & C. Ch., 138.

[Law Reports, 8 Chancery Appeals, 361].

L.C. and L.J.M. Feb. 19, 1873.

MINET V. MORGAN.

[1870 M. 8.]

Production of Documents—Privileged Documents—Affidavit.

A plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information, and belief, contain anything impeaching his case, or supporting or material to the case of the defendant.

Bolton v. Corporation of Liverpool (1) considered.

A plaintiff will not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit, although made before any litigation was in contemplation.

Pearse v. Pearse (2) and *Lawrence v. Campbell* (3) approved.

Order of the master of the rolls affirmed.

THE bill in this suit was filed by a commoner on Dartford Heath against the lord of the manor of Dartford, in order to establish certain rights of common claimed by the plaintiff and the other commoners. The plaintiff, on the application of the defendant, made an affidavit as to the documents in his possession, not claiming privilege as to any of them. The plaintiff afterwards amended his bill, and the defendant then obtained an order for production. The plaintiff thereupon, on the 30th of May, 1872, filed an affidavit stating that he had in his possession or power the documents relating to the matters in question in the suit set forth in the two schedules thereto, and that he objected to produce the documents set forth in the second schedule for the following reasons: First, as to the documents in [362] the first part of the schedule, because they were the *muniments of his title to the several properties owned by him in the parishes in Kent therein mentioned; and did not, as he believed, contain anything material to the defendant's case. Secondly, as to the documents in the second part of the schedule, because they were in their nature privileged. The schedule described these documents as "Correspondence between the plaintiff and his predecessors in title on the one hand, and his and their solicitors from time to time on the other;" and also correspondence and documents passing or obtained during the progress of or in immediate contemplation of this suit. The first part of the second schedule including most of the documents specified in the schedule to the former affidavit, and also a great number of other documents. The second part gave no specific list of documents.

(1) 1 My. & K., 88.

(2) 1 De G. & Sm., 12.

(3) 4 Drew., 485.

The plaintiff, on the 22d of November, filed a further affidavit stating that since his former affidavit was sworn, he had been advised that four of the documents specified in the first part of the second schedule might possibly be material to the case of the defendant, and the plaintiff submitted to produce the same; but as to the remaining documents set forth in the first part of the second schedule, they related exclusively to his title, and to the best of his knowledge, information, and belief, did not contain anything impeaching his case, or forming or supporting the defendant's title or the defendant's case, and were not in any manner material to the case of the defendant as to any matter in dispute between the plaintiff and the defendant in this suit; and he objected to produce those documents. He further stated that by the description "Correspondence between the plaintiff and his predecessors in title on the one hand, and his and their solicitors from time to time on the other," he had meant correspondence between himself and his family solicitors and his present solicitors in this cause, written in contemplation or in the course of this suit, or with reference to the subject matter in dispute, and letters between his mother and her solicitors with reference to questions connected with the matters in dispute in this cause, and that all the documents included under this description were of a private and confidential nature; and he objected to produce them because from their nature they were privileged. *The defendant then took out a sum- [363]mons for the production of the documents as to which protection was claimed. The master of the rolls, on the 11th of December, dismissed the summons with costs. The defendant appealed.

Mr. Fry, Q.C., and Mr. C. Hall, for the appellant: We say that the affidavits are unsatisfactory, and are insufficient to protect these documents. In the first place, the plaintiff speaks only as to his knowledge, information, and belief; and that was in *Combe v. Corporation of London* (1) held to be insufficient. It is clear that the plaintiff has not examined those documents, and he does not say that he has been advised by any person who has done so: *Attorney General v. Corporation of London* (2); *Boyd v. Petrie* (3). It is consistent with this affidavit that no one has examined these deeds. The words in *Peile v. Stoddard* (4) were stronger. There is no cross-examination on these affidavits, and those who make them ought to be bound to use no doubtful expressions. [THE LORD CHANCELLOR: Can a man in such a case say more than according to his knowledge, infor-

(1) 1 Y. & C. Ch., 631; on app., 10 Jur., 57.

(2) 2 Mac & G., 247.

(3) 17 W. R., 903.

(4) 1 Mac. & G., 192.

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mation, and belief?] Then as to the correspondence; that which passed before the bill was filed must be produced: *Pud-don v. Winch* ⁽¹⁾. There is no pretence for protecting that of the predecessors of the plaintiff: *Hawkins v. Gathercole* ⁽²⁾.

Mr. *Joshua Williams*, Q.C., and Mr. *Whately*, for the plaintiff: It is absurd to suppose that a gentleman is to read through all these documents and profess to understand them. The defendant refused to take the affidavit of the solicitors. How can a man in such a case speak to more than his knowledge, information, and belief?

364] *Mr. *Fry*, in reply, cited several of the cases referred to in the judgment of the lord chancellor.

LORD SELBORNE, L. C.: The questions which have been argued in this case were, as I thought, long since covered by authority, and it has been with some surprise that I have heard them revived. Of course I do not mean to say that upon the terms of particular affidavits questions of this sort may not always be liable to arise; but I should have thought that the principles which govern them were by this time well understood, and less liable to be brought into controversy than from the course of the argument appears to be the case. Taking the first point, which relates to the title deeds, it is said that the plaintiff, who is here in the situation in which a defendant ordinarily is, having to make discovery, has not sufficiently brought himself within that protection against the production of title-deeds which is given by the court. Now we have nothing to do with the question whether that protection is or is not based on sound principles, but only with the question whether it ought to be extended to the documents in this case. There might perhaps be great reason for holding that if a man comes into court as a plaintiff, attacking somebody else, he ought to be bound to disclose everything on which he relies for the purpose of his attack. But that undoubtedly is not the present rule of the court: and the sole question here is, whether the plaintiff has, by the terms of this affidavit, sufficiently claimed the protection which the rules of the court give when it is properly claimed. Now in this case, as far as I can judge, there is certainly no indication whatever of an intention on the part of the plaintiff to fence with the court, or to evade giving the discovery which is due from him. So far from that, I find that this further affidavit appears to have been in a great measure made for the purpose of correcting any error which the latitude of the expressions of the former affidavit might possible have covered. [His lordship then stated the substance of the affidavits.] In my judgment the plaintiff has not only said every-

⁽¹⁾ Law R., 9 Eq., 666.

⁽²⁾ 1 Sim., (N.S.), 150.

thing needful to entitle him to *protection, but he has [365 said it with a plainness of expression beyond that which has been required from defendants in some of the cases. In *Bolton v. Corporation of Liverpool* ⁽¹⁾, Lord Cottenham, affirming a decision of the vice chancellor ⁽²⁾, refused production of documents upon a statement much less complete than that in this case. The very argument which we have heard here to-day was urged, and is thus dealt with by Lord Cottenham ⁽³⁾: "The plaintiff here does not claim anything positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defense. How? By proving his title he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title: they are the corporation's title, and not his, and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has, in common with all mankind, to be exempt from dues and customs; and he says, 'Prove me liable, if you can.' The corporation have certain documents which they say, prove this liability. He cannot call for these documents, merely because they may, upon inspection, be found not to prove his liability, and so to help him and hurt his adversary, whose title they are." The position of the parties was there reversed, and some of Lord Cottenham's expressions relate to that fact, but I apprehend that the principle is the same. However, I should be very sorry to be understood to mean that it would be safe for any one to content himself with saying what was said there, which was simply that the documents related to his own title. There can be no doubt that, according to the present practice of the court, a party is expected to go further, and at least to say negatively that the documents do not prove or tend to prove the title of his adversary. Here the only question is, whether that may, with regard to title-deeds of this description, be competently done by saying that to the best of his knowledge, information, and belief, they do not. No authority whatever has been produced to show that *it ever has been held or laid down [366 that a man may not protect himself by putting the negative portion of his statement in that form. I find that in *Adams v. Fisher* ⁽⁴⁾ the form of the denial of the relevancy of the documents to the plaintiff's case was exactly the same as in this case. The defendant denied, according to the best of his knowledge, remembrance, information, or belief, and it does not seem to

(1) 1 My. & K., 88.

(2) 3 Sim., 467.

(3) 1 My. & K., 92.

(4) 3 My. & Cr., 530.

have occurred to Lord Cottenham, or to any one else, that that was insufficient. In *Peile v. Stoddart* (¹), belief upon advice, and no more, was held to be sufficient, and my judgment certainly is, that unless there were, as in the case of *Combe v. Corporation of London* (²), something which qualified this statement, or showed substantial insufficiency on the face of the affidavit, an affidavit such as this is sufficient to entitle a party to the protection which he asks.

I now pass to the other branch of the argument. The first of these affidavits mentioned certain correspondence described as being a correspondence between the plaintiff and his predecessors in title, and their respective solicitors, which, according to reasonable intendment, I think means in their character of solicitors. With, as it appears to me, a scrupulous spirit and purpose, this second affidavit corrects a merely verbal inaccuracy in the description of the correspondence in the first affidavit. The only question is, whether the plaintiff has sufficiently claimed protection for these confidential letters (he says expressly that they were of a confidential nature) which passed between himself and his mother and their respective solicitors with reference to the subject matter in dispute, and with reference to the questions connected with the matters in dispute. I think that if this question had arisen in the days of Lord Cottenham, it would have better justified the prolonged argument than at the present time. There can be no doubt that the law of the court as to this class of cases did not at once reach a broad and reasonable footing, but reached it by successive steps, founded upon that respect for principle which usually leads the court aright. The law has now attained to a footing which made me a little surprised to hear the matter re-opened now. The cases 367] of **Bolton v. Corporation of Liverpool* (³) and *Hughes v. Bidulph* (⁴) were supposed to have laid down a narrower rule, namely, that the communications must have been in anticipation of the particular litigation. But I cannot see that anything was there said tending to the establishment of the narrower rule, though reference was made to some earlier cases, supposed to be authorities for the doctrine that cases laid before counsel for their opinions must be produced, though the opinions might not be. There is, however, no doubt that in those cases, and in some others of about the same date, the doctrine of protection was expressed in terms which, though not deciding the point, had a tendency to narrow the doctrine very much in the way in which the argument offered to us to-day would tend to nar-

(¹) 1 Mac. & G., 192.

(²) 1 My. & K., 88.

(³) 1 Y. & C. Ch., 631, 651; on app., 10 Jur., 57.

(⁴) 4 Russ., 190.

row it. But they were followed by a case before Lord Cottenham himself, in which, though he had no occasion to give a larger extension to the doctrine, yet he stated the principle in a manner which would plainly justify such extension. I mean the case of *Nias v. Northern and Eastern Railway Company* ⁽¹⁾, where Lord Cottenham, referring to *Bolton v. Corporation of Liverpool*, stated what he considered to be the true principle on which that case proceeded. Lord Cottenham there said: "The true principle on which that case proceeds is, that parties are to be at liberty to communicate with their professional advisers with respect to matters which become the subject of litigation, without restriction, and without the liability of being afterwards called upon to produce or discover what they shall so have communicated. Whether a bill is or is not actually filed at the time, is to my mind a matter of perfect indifference. It is not pretended that a solicitor can be compelled to answer as to what his client told him with reference to an expected contest; and can it make any difference in principle, whether what passes between them is communicated by word of mouth or in the form of a case stated for advice?" Then followed *Herring v. Cloberry* ⁽²⁾, in which Lord Lyndhurst stated the principle in terms which were repeated by Lord Justice Knight Bruce in the case of *Pearse v. Pearse* ⁽³⁾. Then followed *Lord Walsingham v. Goodricke* ⁽⁴⁾, and it was evident *that the very learned [368 and accurate judge, Sir James Wigram, who decided it, felt himself embarrassed by the conflicting state of *dicta*, and perhaps authority, which he found in existence, and, yielding to what he thought was the preponderance of authority, he limited the protection much more than he would have done if he had proceeded on what was his view of the sound principle. That case, therefore, without any disrespect to the learned judge who decided it, may well be regarded as one which will not bind, unless subsequent authorities are found to have failed equally to emancipate the court from the supposed fetters of earlier *dicta*, or earlier cases. But in *Pearse v. Pearse* ⁽⁵⁾ a great stride was made towards the emancipation of the court from any limits inconsistent with the just extension and application of the principle. The Vice Chancellor Knight Bruce, in one of the ablest judgments of one of the ablest judges who ever sat in this court, examined the case of *Radcliffe v. Fursman* ⁽⁶⁾, and said that the notion that the house of lords had established any such principle of limitation was really ill-founded; and what is more im-

⁽¹⁾ 3 My. & Cr., 855, 357

⁽²⁾ 1 Ph., 91.

⁽³⁾ 1 De G. & Sm., 12.

⁽⁴⁾ 3 Hare, 122.

⁽⁵⁾ 2 Bro. P. C., 514.

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portant, he practically overruled the distinction by what he did in that case.

It is said that in *Manser v. Dix* ⁽¹⁾ the Vice Chancellor Wood did not go the whole length of *Pearse v. Pearse*. I confess I do not perceive any ground for supposing that he differed from anything that was said in *Pearse v. Pearse*. But there is a later authority by that most accurate and learned judge, Sir R. T. Kindersley — *Lawrence v. Campbell* ⁽²⁾ — which contains a statement of the vice-chancellor's view of the principle and also of the rule which in 1859 had come to be well settled and established in this court on the foundation of that principle. He says: "It is not now necessary, as it formerly was, for the purpose of obtaining production, that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity." I can only say that I entirely agree with the views both of the principle and of its proper extension taken in these later authorities. It seems to 369] me that, according to the fair *interpretation and construction of the language of this affidavit, it is sufficient to bring the present case within them.

The decision of the master of the rolls is, therefore, correct on both points, and this appeal motion must be dismissed with costs.

SIR G. MELLISH, L. J. : I am of the same of opinion.

Solicitors for the plaintiff: Messrs. *Horne & Hunter*.

Solicitors for the defendant: Messrs. *Carlisle & Ordell*.

[Law Reports, 8 Chancery Appeals, 369.]

L.C. and L.J.M. Feb. 24, 1878.

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[1872 K. 55.]

Demurrer—Bill to Restrain Action at Law—Good Defense at Law.

In a bill filed to restrain an action at law the statements were as follows: In the voluntary winding up of a joint stock company a sum of £500 was awarded to the defendant as compensation for his loss of salary as secretary of the company. The defendant was at that time indebted to the company in a larger sum than £500, and the plaintiff, who was the liquidator of the company, accordingly wrote to the defendant informing him of the award, and asking him to pay the balance due from him after setting off the £500 so awarded. The defendant brought an action against the plaintiff, seeking to make him personally liable for the sum of £500, as money had and received to the defendant's use. The bill prayed a declaration that the defendant was not entitled to the payment of the £500 without settling the debt due from him to the company, and that the action might be restrained. The defendant demurred for want of equity:

(1) 1 K. & J., 451.

(2) 4 Drew., 485, 490.

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Held (reversing the decision of *Malins*, V.C.), that as the bill disclosed a good defense at law to the defendant's action there was no ground for relief in equity and the demurrer was allowed.

THIS was an appeal from a decision of Vice Chancellor Malins, overruling a demurrer to the bill which was filed by Charles Fitch Kemp, an accountant, against Stephen Tucker.

The bill made the following allegations: By an agreement entered into between the London, Birmingham, and South Staffordshire Bank and the European Bank, on the 13th of February, *1865, the Birmingham Bank agreed to trans- [370 fer its business to the European Bank upon certain terms therein mentioned, including a provision that the Birmingham Bank was to be wound up voluntarily; that the plaintiff was to be the official liquidator, and the assets were to be got in under the liquidation and applied to the purposes specified in the agreement, one of which was to the following effect: "That £6000 be paid to the directors of the Birmingham Bank, to be applied by them in payment of such compensation to such officers of the company as they may think proper, and otherwise towards the expenses of and incident to the arrangement." By a special resolution, passed by the shareholders of the Birmingham Bank in March, 1865, it was resolved that the agreement for transfer of their business to the European Bank should be adopted, and that the Birmingham Bank should be wound up voluntarily, and the plaintiff was appointed liquidator. The defendant was, at the date of this agreement, secretary of the Birmingham Bank, and in the month of October, 1865, the directors awarded the sum of £500 as the sum payable by the Birmingham Bank to the defendant for his services as secretary, and as compensation for the loss of his situation. Had the defendant not been indebted to the bank, the plaintiff, as liquidator of the bank, would have paid him out of the assets of the bank the sum of £500 so awarded, but it appeared that the defendant was indebted to the bank, upon his account with the bank, in the sum of £1543 8s. 2d., and in consequence the plaintiff wrote to the defendant, on the 26th of October, 1865, the following letter:

"Dear Sir,—The committee of directors of the London, Birmingham, and South Staffordshire Bank, after mature consideration, have decided on awarding you the sum of £500 in settlement of any claim you may have in respect of salary and compensation. This matter being now arranged, I beg to enclose the account of the bank against you, showing a balance due by you of £1543 8s. 2d., against which the bank holds cash and shares of the estimated value of £750. The last two shares have not been transferred. I shall therefore be obliged if you

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will sign the enclosed transfer and return it to me. It will now
371] be convenient that you should make *some proposition
for the payment of the balance, and I shall be glad to hear from
you on this subject without delay.

Yours faithfully,

C. F. Kemp, Liquidator."

No part of the balance of £1543 8s. 2d. had been paid by the defendant, nor did he take any steps to recover the £500 until the commencement of the action after mentioned. The sum of £500 so awarded to the defendant was intended by the directors to be paid by the plaintiff only as liquidator of the bank, and the plaintiff had no right or authority to pay such sum except subject to the payment by the defendant of the money due by him to the bank. The defendant, however, alleged that the plaintiff was bound to pay over the £500 to him out of the moneys held by the plaintiff as liquidator, irrespective of any money owing by the defendant to the bank, and he had commenced an action in the Court of Exchequer against the plaintiff personally to recover the said sum and interest. The writ was issued by the defendant in this action on the 25th of October, 1871, but no further proceedings therein were taken by him until the 24th of October, 1872, when he delivered the declaration. In the action the defendant claimed against the plaintiff for money had and received to the use of the defendant, but the plaintiff in no sense received any such money, except so far as he had assets in his hands or under his control belonging to the bank as liquidator, out of which the £500 would have been payable to the defendant, subject to a set-off in respect of the moneys due from the defendant to the bank, and such last-mentioned moneys being in fact in excess of the sum awarded to the defendant nothing was payable to him.

On the 17th of June, 1872, the Birmingham Bank and the plaintiff presented a petition to this court, praying that the winding-up might be continued subject to the supervision of the court, and the petition was still pending.

The bill alleged that any claim which the defendant had against the bank, or the plaintiff as liquidator, ought to be made in the winding-up and not otherwise, and that the defendant had no claim against the plaintiff personally, but only in his 372] character of *liquidator. The bill prayed a declaration that the defendant was not entitled to the £500 awarded as compensation to him, except subject to the payment by him of all moneys due and owing by him to the bank, and that the defendant might be restrained from further prosecuting the action commenced against the plaintiff to recover the sum awarded as

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compensation to him, and from commencing any other action against the plaintiff for the like purpose. To this bill the defendant put in a general demurrer for want of equity. The vice-chancellor overruled the demurrer ⁽¹⁾.

Mr. *Hemming*, for the appellant: If the statements in the bill are correct, and the plaintiff received the money in his official capacity as liquidator only, the *plaintiff has a good de- [373] feuse at law, which he can raise on the plea of *non assumpsit*, and he has no ground for asking this court to stop the action. The more groundless the action is the less reason is there for removing it from the jurisdiction, of a court of law which is perfectly competent to do justice.

Mr. *Glasse*, Q.C., and Mr. *Maidlow*, for the plaintiff: The plaintiff is desirous of pleading a set-off, and we cannot do that in the action, because the action is against him personally, and the debt from Tucker is due to the company. The company is now in liquidation, and the rights of the parties can be better determined in the winding-up than in an action at law.

LORD SELBORNE, L.C.: The bill in this case seeks to restrain an action at law, which according to the statements in the bill is frivolous and groundless. I feel bound to say the bill seems to me equally groundless. Either there was a personal liability in the defendant at law or there was not. The bill says there was not; if so, the plaintiff has a perfectly good defense at law,

⁽¹⁾ 1873. Jan. 13. SIR R. MALINS, V.C., after shortly stating the allegations in the bill, continued: Under these circumstances the defendant, being in possession of that letter of October, 1865, brings an action on the 24th of October, 1871, one day within the six years, at which period he would have been barred by the statute, and then takes no further step in the action for another year, that is, till the 24th of October, 1872, when he delivers his declaration claiming against Kemp as for money had and received to the use of the defendant. A course more unbecoming could not be conceived by any man than bringing this action, endeavoring to fix a personal liability upon Kemp, when he was acting only in his public capacity as an officer of the company. He is not sued as liquidator, but to make him personally liable. It is clear, on this demurrer, that I cannot disregard the circumstance which is stated in the bill, that a petition for continuing the winding up under supervision has been presented. If, therefore, Tucker thinks fit to go on with his action, I could restrain him from proceeding

with it against Kemp as a public officer. His proper course was to have filed an affidavit and put forth such excuses as he might think fit; but instead of that he files a demurrer, and his counsel admits that the object of the action is to make Kemp liable for what he was not personally liable for. I admit that where there is an action commenced at law, and there is a good defense at law, it is not right to stop the action; but here, where I see that Kemp has been acting in his official capacity, it is not justifiable that he should be sued personally. If he had been sued in his official capacity there might have been some ground for the action; but Tucker does not do that. It appears to me to be a clear case for allowing the set-off to be made of the £500 against the debt due to the bank, and it is as clear a case for overruling the demurrer as can possibly be. I shall show my sense of the impropriety of the course taken by the defendant in overruling the demurrer with costs, as I consider it a dishonest proceeding on the part of Tucker.

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and he has no reason to come to this court. Whatever other reasons the plaintiff may have for bringing the matter before a court of equity we can only attend to those which are stated in the bill. The demurrer must be allowed.

SIR G. MELLISH, L.J.: I am of the same opinion. The vice-chancellor appears to have been unduly afraid that the court of law would not do justice in this matter. If the facts are correctly stated in the bill, there is no doubt that a court of law is fully competent to deal with the case, and will do full justice to the parties.

Solicitors for the defendant: Messrs. *Bell & Crowder*.

Solicitors for the plaintiff: Messrs. *Taylor, Mason, & Taylor*.

[Law Reports, 8 Chancery Appeals, 374.]

L. C. and L. J. M. Feb. 21; March 14, 1873.

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**Ex parte* CRISPIN. *In re* CRISPIN.

Bankruptcy — Alien Non trader — Jurisdiction — Act of Bankruptcy — Defeating and Delaying Creditors — Bankruptcy Act, 1869, s. 6.

An alien non trader domiciled abroad, who contracts debts in England, is liable to be made a bankrupt under the Bankruptcy Act, 1869, if he commits an act of bankruptcy in England, although he may have left England before the petition for adjudication is presented. But he cannot be made a bankrupt upon an alleged act of bankruptcy committed abroad.

A non trader, a subject of, and domiciled in, Portugal, contracted a debt in England, where he was temporarily resident. The creditor served him while in England with a writ issuing out of the Court of Exchequer. The alien entered an appearance to the writ, and left England for Portugal the next day, alleging as his reason for doing so that he had been disappointed of some money which he expected, and could not pay his way in England. He afterwards said that he had left England in consequence of being served with the writ:

Held, that there was no sufficient evidence that he left England in order to defeat and delay his creditors, and that no act of bankruptcy had been committed.

Although, in the case of a domiciled Englishman, the fact of his leaving England after service of a writ and so escaping a debtor's summons would afford a strong presumption that he intended to defeat and delay his creditors, yet the same presumption does not apply to a foreigner who is returning to his own country.

THIS was an appeal from an order of Mr. Registrar Hazlitt, sitting for the chief judge in Bankruptcy, by which the appellant, Francesco Jose Cortes Crispin was adjudicated bankrupt.

The appellant was a Portuguese subject, and had his domicile in Portugal. He had for several years been prosecuting a suit in the Court of Chancery in England, against Dr. Cumano and others, in which he sought to recover a sum of about £50,000 consols, which was part of his father's estate, and during those years he had several times come to England and resided there for some months at a time. He borrowed large sums of money

on the security of his expectations, partly in Portugal and partly in England; and, among others, he borrowed £236 14s. 6d. from the petitioning creditor, Jose Carlos Mandel Ferreira. Of this sum £100 was advanced in Lisbon, and the rest in various small sums in London, in the year 1868. On each occasion the appellant *signed a memorandum in the Portuguese language. One of these when translated was as follows:

"I received from my most excellent friend, the most excellent Senhor J. C. M. Ferreira, the sum of £50 sterling, which the same most excellent friend had the goodness to lend me on this occasion for expenses of my suit in London, which I received to repay to him as soon as I shall be able, and may have received the fortune of my father, Senhor Henrique Crispin, whether I may receive it in London or in Portugal, and which sum shall earn its competent interest until its reimbursement; and in case of my default, for any unexpected circumstance, my heirs are to pay the same. And for having received the said sum I passed the present receipt this day. London, January 18, 1868."

The others were in a similar form. In November, 1871, the appellant came to England, and brought with him a deed of compromise which had been entered into in Portugal between him and Dr. Cumano, and which had been approved by the Portuguese court at Faro, under which he was to receive £40,591 10s. 2d. The appellant claimed that this sum should be at once paid to him by Dr. Cumano out of the sum of consols, but Dr. Cumano insisted that a sufficient sum in consols to pay the £40,591 10s. 2d. should be transferred into the Court of Chancery, on the ground that the claims of certain persons in Portugal had not been got rid of by the compromise, and that creditors of the appellant, to the amount of £25,000, had given notice to him that they had claims on the fund. On the 29th of November, 1871, the petitioning creditor sued out a writ in the Court of Exchequer against the appellant, to recover the money which he had lent to him, which writ was served on the appellant on the 13th of February, 1872, at an hotel in Glasshouse street, where he was staying. On the next day the appellant left London for the continent, and went *via* Madrid to Portugal, and had never since returned to England. The petition for adjudication was presented on the 9th of March, 1872, and was served on the appellant in Lisbon. After several adjournments he was adjudicated bankrupt on the 11th of December following.

On the question of the object of the appellant in leaving [376 England immediately after the writ had been served on him, the most material evidence consisted of declarations by the appellant to his landlady, Mrs. Salles, and to Henrique Carlos

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Ferreira, the brother of the petitioning creditor. To the former he stated that his reason for going was that he had no money to pay his expenses, and that the only thing he feared was that he could not pay his way. But the brother of the petitioner stated that he met the appellant at Madrid on his way to Portugal, and that he then said that he had left London in consequence of being served with the writ.

Mr. *De Gex*, Q.C., and Mr. *Brough*, for the appellant: The court had no jurisdiction to adjudicate the appellant a bankrupt. He is a Portuguese subject, domiciled in Portugal, never had a place of business in England, and had left England before the petition was presented. The word "debtor" in the Bankruptcy Act, 1869, must have some limitation. It must mean one who is in some sense an English subject. If a foreigner is domiciled in England, or has a place of business here, he would be subject to the English law of bankruptcy. He must be subject to English law at the time when the proceedings in bankruptcy are commenced. There is no authority to show that a foreigner who comes to England for a temporary purpose and contracts a debt here, and then returns to his own country, can be made a bankrupt in England, and be compelled to distribute his property according to our laws. It would be an undue interference with the laws of other countries: *Story's Conflict of Laws* (1); *Cookney v. Anderson* (2). Although that case was overruled by *Drummond v. Drummond* (3), the principle on which it was decided was not disputed. *Ex parte O'Loghlen* (4) illustrates the same principle. In the second place, there was no act of bankruptcy. The appellant appeared to the writ when it was served on him, and the creditor might have pursued his remedy against his property in this country. His object in leaving the country was not to defeat his creditors; the reason is stated in the affidavit of his 377] *landlady — namely, that he could not live here without getting into debt. It would be very hard on a foreigner, temporarily resident in England, if his return to his own country and continued residence there, were to be considered to be acts of bankruptcy. In the third place, there was no debt. The receipts show that the money was borrowed on the terms of its repayment being postponed till the money in Chancery was realized. There must be a present debt in order to support a petition in bankruptcy: *Ex parte Sturt* (5).

Mr. *Roxburgh*, Q. C., and Mr. *Bagley*, for the trustee: Previously to the Bankruptcy Act of 1869, foreigners who were traders were expressly made subject to the bankrupt laws:

(1) Sect. 539.

(1) Ibid., 6 Ch., 406.

(2) 1 D. J. & S. 365.

(2) Law Rep., 18 Eq., 309.

(3) Law Rep. 2 Ch., 32.

Bankrupt Law Consolidation Act, 1849, s. 277; and it made no difference that they resided abroad, provided the debt was contracted in this country: *Allen v. Cannon* ⁽¹⁾; *Ex parte Smith* ⁽²⁾; *Alexander v. Vaughan* ⁽³⁾; *Williams v. Nunn* ⁽⁴⁾. It is reasonable that foreigners should be subject to the bankrupt laws. They are amenable to the ordinary process for recovering a debt, and their goods in England may be seized. Bankruptcy is only another method of doing the same thing, so as to divide the property equitably among the creditors; there can be no difference in principle between the two processes. It is clear that the Bankruptcy Act, 1869, contemplates foreigners being subject to it. The 6th section speaks of the debtor making an assignment "in England or elsewhere" of his property. Therefore, if a Portuguese subject, being in Portugal, assigns property in England, it is an act of bankruptcy. In the present case the bankrupt was actually in England, and amenable to our laws, when the act of bankruptcy was committed. It is immaterial that he was abroad when the petition was presented, for the bankruptcy commences with the act of bankruptcy. Supposing that a debtor's summons had been served on him, and he had then left England, would it be contended that he could not have been made bankrupt on that debtor's summons?

*It is clear that in this case an act of bankruptcy was [376 committed. His own admission to the brother of the petitioning creditor shows that he left England to defeat his creditors. The fund in the Court of Chancery could not be got out without the assistance of the appellant, which he refused to give. Consequently, the creditor could not get any satisfaction by enforcing the writ at common law; but if the appellant had been made bankrupt, his trustee would have been able to get possession of the fund for the benefit of the creditors. The appellant attempted to defeat this object by leaving the country, so that the debtor's summons could not be served on him; and his continued residence abroad has been with a similar intent. The debt of the petitioning creditor was sufficient. The receipts were acknowledgments of a present debt with a security on the property when realized.

Mr. *De Gez*, in reply.

March 14. SIR G. MELLISH, L.J., delivered the judgment of the court as follows: This was an appeal from an order of Mr. Registrar Hazlitt, by which the appellant, Francesco Jose Cortes Crispin, was adjudicated a bankrupt. Three objections were made to the order of adjudication. 1. That the Court of Bank-

⁽¹⁾ 4 B. & A., 418.

⁽²⁾ Cited in Cowp., 402.

⁽³⁾ Cowp., 398.

⁽⁴⁾ 1 Taunt., 270.

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ruptcy had no jurisdiction to adjudicate the appellant a bankrupt. 2. That there was no sufficient proof of an act of bankruptcy. 8. That there was no sufficient proof of the petitioning creditor's debt. [His lordship then stated the facts narrated above, and continued:] It was contended by the respondent that the appellant was purposely delaying applying to the Court of Chancery for the money in order to defeat his creditors; but we do not think this charge is proved by the evidence. Two acts of bankruptcy were relied on: first, that the appellant departed out of England with intent to defeat and delay his creditors; the other, that being out of England, he remained out of England with the like intent.

The first question to be considered is, had the court jurisdiction to adjudicate the appellant a bankrupt? And this depends 379] upon *the question whether a foreigner, who is not a trader, and who comes to England for a temporary purpose, and who quits England before a petition in bankruptcy is presented against him, can be adjudicated a bankrupt, either upon an act of bankruptcy alleged to have been committed while he was in England, or upon an act of bankruptcy alleged to have been committed after he had left England. It is obvious that some limitation must be put on the general words "creditor" and "debtor" in the 6th section of the Bankruptcy Act, 1869. They cannot apply to every creditor and every debtor throughout the world. It was argued on the part of the appellant that the word "debtor" must be confined to debtors subject to the laws of England, and that as the appellant was a foreigner, and had left England before a petition was presented against him, he had ceased to be subject to the laws of England, and no petition could be presented against him. We agree that the word "debtor" must be construed to mean "debtor properly subject to the laws of England;" but we are of opinion that it is the act of bankruptcy, and not the petition, which gives jurisdiction to the Court of Bankruptcy, and that if a foreigner comes to England, and contracts debts in England, and commits an act of bankruptcy in England, he thereby gives the Court of Bankruptcy jurisdiction over him. The title of the trustee relates back to the act of bankruptcy, and by the act of bankruptcy the property of the debtor is transferred to the trustee, provided a petition is presented in due time; and we see no good reason why this consequence should not follow in the case of a foreigner who has contracted debts in England, and commits an act of bankruptcy in England, and who is subject to the laws of England while he is here. We also think that this conclusion is supported by the authorities. These appear to establish that if a foreign trader trades in England, and commits an act

of bankruptcy in England, he is subject to the bankrupt laws, and that it makes no difference that he is not a resident trader in England, or that his principal place of business is elsewhere, and that he may be made bankrupt upon an act of bankruptcy which consists in departing from England with intent to defeat and delay his creditors. We are of opinion, however, that a foreigner, not domiciled in England, and not *carrying on trade in England, who quits England with- [380 out having committed an act of bankruptcy, cannot be made a bankrupt upon an alleged act of bankruptcy committed out of England. We think that the legislature cannot have intended to enact that if a foreigner who is not subject to the laws of England does something in his own country which may be perfectly lawful and innocent by the laws of that country, the effect should be that his property should be vested in a trustee in England for the benefit of his creditors. Then we think that a consideration of the particular acts which are made acts of bankruptcy when committed out of England will confirm this conclusion. The first is, "that the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally." This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy. The second is, "that the debtor has in England or elsewhere made a fraudulent conveyance, &c., of his property or any part thereof." This clearly means, and has always been interpreted as meaning, fraudulent by the law of England, and therefore cannot properly apply to a conveyance which is executed in, and is to operate according to the law of, a foreign country. The third is the one now in question. "That the debtor, with intent to defeat or delay his creditors, has, being out of England, remained out of England." We think these words imply that the person who remains out of England, has his home or place of business in England, and cannot reasonably be held to apply to the case of a foreigner remaining in his own home.

The next question to be determined is whether there was sufficient evidence that the appellant committed an act of bankruptcy by departing from England with intent to defeat or delay his creditors. There are two witnesses who give evidence of statements by the appellant which may be material to be considered in determining with what intent he left England. The

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381] first is *Mrs. Salles, who was his landlady at 13, Glasshouse street. She says: "He was in the hotel. He made a communication to me before he left; he said that he was expecting a letter from a solicitor of a Dr. Cumano to pay him some money, but as he had not sent it he could not stop any longer. The reason he gave for going away was that he had no money to pay his expenses. The only thing, he, said, he feared was, he could not pay his way." The second was a brother of the petitioning creditor, who met him at Madrid whilst he was on his way to Portugal. He says, speaking of the appellant, "He told me that he had been served with a writ at the suit of my brother, and that in consequence of his being served with the writ he left London." We see no reason to doubt the truth of the statement made by the appellant to his landlady, that he was obliged to leave England because he had no funds left to enable him to live in England, and we do not think that the statement he is said to have made to the petitioning creditor's brother is necessarily inconsistent with it, because it may well be that the fact of being served with a writ by one of his creditors convinced him that it was impossible that he could go on living in England on borrowed money. The appellant, therefore, had a most justifiable cause for leaving England. But it is argued that nevertheless his leaving England must have had the effect of defeating or delaying his creditors, and was, therefore, an act of bankruptcy, and it is desirable to consider in what respect his leaving England had the effect of defeating or delaying his creditors. The petitioning creditor had served him with a writ, and an appearance was entered to that writ, and there is no evidence that the petitioning creditor would be delayed in obtaining judgment and issuing execution in the action in the absence of the appellant. If the appellant had gone away after he knew a writ was issued, to avoid service, the case might have been different. It was argued, however, that if the appellant had remained in England he might have been served with a debtor's summons and made a bankrupt; and it is necessary, therefore, to consider whether the appellant was bound to remain in England in order that the petitioning creditor or his other creditors might have an opportunity of making him a 382] bankrupt. If a domiciled Englishman, *who is being pressed by his creditors, and has been served with a writ, were to leave England, and so to escape being served with a debtor's summons, there would be strong evidence that he intended to defeat or delay his creditors, because England is the proper, if not the only place for him to be made a bankrupt in, and if he cannot pay his debts he has no right to avoid being made a bankrupt there. But we do not think the same reasoning ap-

plies to a foreigner who has come to England for a temporary purpose and leaves England to return to his own home. He can be followed to his own country, and his own country may be the most convenient place for the distribution of his property among his creditors. We must assume that there is a proper law in Portugal for distributing a debtor's property among his creditors, and we have no means of knowing whether it is more or less dilatory than the law of England.

On the whole, we are of opinion that there is no sufficient evidence that the appellant has committed an act of bankruptcy in England, and that he cannot be made bankrupt for an act of bankruptcy committed out of England. Therefore the order of adjudication must be reversed, and the appellant must have his costs of resisting the adjudication in the court below from the petitioning creditor.

Solicitor for the appellant; Mr. *E. Saxton*.

Solicitors for the respondent: Messrs. *Keighley & Began*.

[Law Reports, 8 Chancery Appeals, 383.]

L.JJ. Dec. 17, 21, 1872. Jan. 11, 18, 1873.

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[1873 V. 23.]

Statute of Limitations—3 & 4, Will. 4 c. 27, s. 26—Concealed Fraud—Purchaser for Value—Legal Title—Suit in Equity.

The plaintiff, by his bill, stated to the following effect: That an estate being limited to the plaintiff's father for life, remainder to his first and other sons successively in tail, the father in 1797 intermarried with a woman who had been his mistress, and had just borne him a son; that after the marriage the parents agreed to pass off the son as legitimate, and he was always recognized as such; that the plaintiff, who was born ten years afterwards, was the eldest, but was brought up in the belief that he was the second, legitimate son; that when the illegitimate son came of age he was informed by the father that he was illegitimate, and with that knowledge joined the father in suffering a recovery to bar the entail; that on the marriage of the illegitimate son in 1823, he and the father made an antenuptial settlement of the estates, which was negotiated by the wife's father, as her agent, and on her behalf, with full knowledge that the husband was illegitimate; that the father died in 1832, upon which the illegitimate son entered into possession, and remained so till his death in 1842, ever since which time his eldest son had been in possession; that the plaintiff had never until 1866 believed or suspected, or had any reason to believe or suspect, that his older brother was illegitimate; and the bill prayed for a declaration that the plaintiff was entitled to the estates, and that the defendants, who claimed under the settlement of 1823, might be ordered to give up possession to him. The defendants demurred:

Held, that a Court of Equity had jurisdiction:

Held, that the designedly bringing up the plaintiff in the belief that he was the second legitimate son was a case of concealed fraud within the meaning of the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 26), and that time did not begin to run against the plaintiff's right to sue in equity until the time when he might first, with reasonable diligence, have discovered the fraud:

Held, further, that a purchaser for value who, though not having any personal notice of the fraud, contracts through an agent who knows of the fraud, cannot protect himself under the saving in sect. 26 as a "*bond fide* purchaser for value who at the time of the purchase did not know and had no reason to believe that any such fraud had been committed," and that therefore the persons claiming under the settlement of 1823 could not sustain this defense :

Held, therefore (affirming the decision of *Malins*, V.C.), that the demurrers must be overruled.

Whether a defense of purchase for value under sect. 26 can be raised by demurrer, and whether it must not be by plea or answer supported by the defendant's oath, *quere*.

THESE were appeals from orders of Vice-Chancellor Malins overruling demurrers.

384] *The following is an outline of the statements of the bill : That by the will of Sir Lionel W. Fletcher, who died in 1786, certain estates were limited to trustees for a term of 500 years, and, subject thereto, to Frederick Fletcher Vane for life, with remainder to trustees during his life to preserve contingent remainders, with remainder to the first and other sons of Frederick F. Vane (afterwards Sir F. F. Vane) successively in tail male, with divers remainders over. The trusts of the term were to raise money to make good any deficiency of his personal estate to answer the purposes therein mentioned. That the term of 500 years was still a subsisting term ; that new trustees thereof had from time to time been appointed, and that the trusts thereof had not been fully performed. That on the 9th of March, 1797, Sir Frederick F. Vane intermarried with Hannah Bowerbank ; that previously to the marriage he had cohabited with her, and had by her three illegitimate children. The first was Hannah, born on the 22d of August, 1794, and the second, Walter, born on the 9th of July, 1795. That in January, 1797, Hannah Bowerbank, was again pregnant. Sir Frederick F. Vane had repeatedly promised to marry her, and before the birth of the third child she threatened that if he did not he should never see her or the children again. On the following day he informed her that he had got the license, and that they were to be married next morning. This sudden announcement produced a premature confinement in the course of the day, and she was delivered of a child, who was baptized Francis Fletcher Vane. The marriage took place on the 9th of March, 1797, as soon as she had recovered from her confinement. That on the 16th of April, 1797, Francis F. Vane was baptized at St. George's, Queen's Square, Bloomsbury, and that the entry in the register as now standing stated him to have been born on the 29th of March, 1797, but that it was evident, from the color of the ink and other circumstances, that the entry had been tampered with, and that the words and figures "born 29 March, 1797," had been added some time after the original entry. That after the birth of Francis

F. Vane the medical attendants stated their opinion that Lady Vane would never have another child born alive, which opinion was communicated to Sir Frederick F. Vane and Lady Vane.

*That Sir Frederick F. Vane determined to bring up [385 Francis F. Vane as his legitimate son, and, with a view to this, got the words "born 29 March, 1797," inserted in the baptismal register. That in 1801 Sir Frederick F. Vane and Lady Vane went to reside at Armathwaite Hall, in the parish of Basenthwaite, in Cumberland, and Sir Frederick F. Vane continued to reside there till his death; that Francis F. Vane was a good deal abroad up to his attaining twenty-one, but when in England resided principally at Armathwaite Hall, and after he attained twenty-one continued to reside there till his marriage; that Sir Frederick F. Vane and Lady Vane were visited by their neighbors, and Francis F. Vane were introduced by Sir Frederick F. Vane and spoken of and treated by him as his legitimate son and heir apparent, and continued to be so spoken of and treated as long as Sir Frederick F. Vane lived. After the removal to Armathwaite Hall Sir Frederick F. Vane and Lady Vane had two children, a daughter, born on the 18th of March, 1802, and the plaintiff, born on the 10th of May, 1807. That Francis F. Vane attained twenty-one in 1818, and his father thereupon informed him that he was illegitimate; that shortly afterwards Sir Frederick F. Vane and Francis F. Vane, as first tenant in tail, suffered recoveries of the devised estates to enure to such uses as the father and son should jointly appoint, and in default to the uses therein mentioned. Considerable portions of the estates were subsequently sold for paying debts of Sir Frederick F. Vane.

On the 10th of April, 1823, Francis F. Vane intermarried with Diana Olivia Beauclerk, and before the marriage a settlement was made of the unsold estates to the use of Francis F. Vane for life, with remainder to trustees during his life, to preserve contingent remainders, with remainder to the use that Lady Diana Olivia Vane might receive a rent-charge during her life, and, subject thereto, to the use of trustees for a term of years to secure the rent-charge, with remainder to trustees for a term for raising portions for younger children, and, subject as above, to the use of the first and other sons of the marriage successively in tail male.

The bill charged that Francis F. Vane was at and prior to the suffering of the recoveries well aware that he was illegitimate, and *he concurred in the recoveries, and in limiting the [386 devised estates to such uses as he and Sir Frederick F. Vane should appoint, and in the settlement of April, 1823, with the

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full knowledge that he was illegitimate, and with the fraudulent intention of depriving the plaintiff of his right to the estates.

Par. 30. "The plaintiff also charges that the fact that the said Francis F. Vane was illegitimate was well known to the said C. G. Beaclerk, the father of the defendant Diana Olivia Vane, for some time before the marriage of the said Francis F. Vane and D. O. Vane, and that the said C. G. Beaclerk negotiated the terms of the said settlement of the 8th of April, 1823, as the agent and on behalf of his daughter, the said D. O. Vane, with full knowledge that the said F. F. Vane was illegitimate, and had no interest in the devised estates."

Par. 31. "The plaintiff charges that the recoveries so suffered as aforesaid, and the limitation of the said estates to such uses as the said Sir Frederick F. Vane and Francis F. Vane should jointly appoint, and the said settlement of the 8th of April, 1823, were fraudulent and absolutely void, and of no effect except so far (if at all) as the same may have affected the life estate of the said Sir Frederick F. Vane in the said estates under the will hereinbefore stated; and that the defendant, D. O. Vane, had, through the said C. G. Beaclerk or otherwise, full notice prior to the said marriage and the execution of the said settlement, that the said Francis F. Vane was illegitimate, and that the said settlement was fraudulent and void so far as it affected to deal with or settle any interest in the said devised estates or any part thereof other than the life estate therein of the said Sir Frederick F. Vane.

That after the marriage Francis F. Vane entered into possession of the estates comprised in the settlement of the 8th of April, 1823; and, on Sir Frederick F. Vane's death in February, 1832, assumed the title of Sir Francis F. Vane, Bart., and continued in possession of the estates. That Francis F. Vane had issue by D. O. Vane three children of whom Henry Ralph Vane was the eldest. That Francis F. Vane died in February, 1842, and on his death Henry Ralph Vane entered into possession of the estates, and had ever since continued in such possession.

387] *In 1871 Henry R. Vane intermarried with the defendant Margaret Vane, and previously to the marriage executed divers deeds by which he purported to bar his estate tail and re-settle the estates. That Lady Vane, formerly Hannah Bowerbank, died in December, 1866.

Par. 43. "The said Lady Vane, during her lifetime, made divers true and particular statements to various persons, detailing the facts and circumstances connected with her marriage and the birth of her several children, as well those born after as those born before her marriage; and the said Lady Vane also, from time to time, made divers statements to various persons

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which were not intelligible to persons who were not acquainted with the facts and circumstances aforesaid; and the said facts and circumstances were well known to divers persons, as well from the statements made by the said Lady Vane as from other sources, and in particular the said facts and circumstances were well known to the defendant D. O. Vane, and her father, C. G. Beauchlerk, before her marriage with the said Francis F. Vane, and to the defendants Henry Ralph Vane and Margaret his wife before their marriage."

That in October, 1866, the plaintiff, who was on a visit with his wife to the defendant D. O. Vane, was informed by his wife that she had just had a conversation with the defendant D. O. Vane, to the effect stated in the bill, the material point of which was that D. O. Vane stated Francis F. Vane to have been born just after the marriage of his parents; and in November, 1866, the plaintiff's wife informed him that Lady Vane had confessed to her that Francis F. Vane was born before her marriage.

Par. 46. "Until the communication stated in the last preceding paragraph was made to the plaintiff, he had never heard, either directly or indirectly, or had any reason to believe or suspect, and did not believe or suspect, that the said Francis F. Vane was illegitimate. The facts that the said Francis E. Vane was illegitimate, and that the plaintiff was the eldest legitimate son of the said Sir Frederick F. Vane, and was so entitled, as aforesaid, to the said devised estates, were concealed from the plaintiff by the fraudulent contrivances of the said Sir Frederick F. Vane and Francis F. Vane hereinbefore stated, and were only discovered by the plaintiff from *inquiries made by [388 him after, and in consequence of, the communications so made to him as stated in the last preceding paragraph."

The bill, which was filed against Sir Henry Ralph Vane and his wife, and Lady Diana Olivia Vane, and other persons claiming under the settlement of 1823, prayed for a declaration that the plaintiff was entitled to the devised estates as tenant in tail male in possession, subject to the term of 500 years and the trusts thereof, and that the defendants might be ordered to deliver up possession to the plaintiffs, and for an account of rents. Sir Henry Ralph Vane and his wife, and Lady Diana Olivia Vane and other parties claiming under the settlement of 1823, demurred to the bill. Vice Chancellor Malins having overruled the demurrers (¹), these appeals were presented.

(¹) 1872. Nov. 5. SIR R. MALINS, V. C.: The right of the plaintiff to the possession of these estates on the allegations in this bill accrued in 1832, that is more than forty years before the filing of the bill; and as he was under no dis-

ability he would be barred in 1852 by the Statute of Limitations (3 & 4 Will. 4, c. 27), unless he can bring himself within the protection of the 26th section of the statute. The only question, therefore, I have now to decide is, whether

389] *Sir R. Baggallay, Q.C., and Mr. Pearson, Q.C. (Mr. *Marlen* with them), for the appellants: We contend that this 390] case is not within the 26th section of *3 & 4 Will. 4, c.

he brings himself within that section. In order to do so he first must show that there has been a fraud, and a concealed fraud. Has there, then, been a fraud? A more direct, more positive fraud than is alleged in this bill can hardly be conceived. The bill alleges that the father, knowing that Francis was illegitimate, and had no title either to the baronetcy or the estates, held him out to the world and to the plaintiff as the eldest legitimate son, and, as heir to the baronetcy, heir to the estates. Now, taking these allegations, as for the present purpose they must be taken, to be true, the father and mother, by palming off an illegitimate son as the eldest legitimate son, have defrauded the plaintiff of that inheritance to which he was entitled. The bill further states that Francis attained his majority in 1818, and that his father then informed him that he was illegitimate. That seems an act of honesty on the part of the father which is utterly irreconcilable with his subsequent conduct as stated in the bill, because the bill goes on to state that in 1823 he joined this son, whom he had told of his illegitimacy in 1818, in suffering a recovery, stating on the face of the deed that Francis was his eldest legitimate son, and he joined with him in imposing on the purchasers of the estates which were sold, by giving them a totally bad title, because from 1832 to 1852 the plaintiff could have turned the purchasers out of possession if he had discovered what his title was. This incomprehensible inconsistency is followed by another improbable transaction, viz., that in the same year 1823 a marriage was negotiated between the son Francis (who was then twenty-six years of age) and Lady Diana Beauclerk. The marriage took place, and a settlement was executed, by which Francis, the illegitimate son, was made tenant for life, with remainder to their sons successively in tail; and there is this extraordinary allegation, which I say again I am bound to take as true for this particular purpose, though I verily believe it will turn out not to be true in fact, that this lady and her father knew that she was about to marry an illegitimate son, whose brother, the only legitimate son, was then sixteen years of

age, and, according to all human probability, would discover his title upon coming of age, and would turn them out of possession of the estates as soon as the father died. The thing is utterly incredible. However the bill states it to be so, and however incredible it is I must take it to be the fact. The father continued the fraud, for it was a fraud he was committing every hour of his life. It was not necessary for him to say in words to the present plaintiff: "Francis is your elder brother, your legitimate brother, born after your mother and I married;" it was unnecessary for him to say that in words, because his conduct said it; he held him out as his eldest legitimate son, his heir-apparent, the successor to the title and to the estates under the will of his own father; therefore I say that that fraud which he was committing on the plaintiff he continued every hour and minute of his life, and he died in the perpetration of that fraud. The mother was concurring in this, and not only the mother, but the son Francis, who, as I have already stated, was told of these facts in 1818. He, by concealing it from his brother, was also guilty of fraud. The next point is, was it a concealed fraud? I decided in the case of *Chetham v. Hoare* (Law Rep. 9 Eq. 571), that this section of the statute has such extensive application, and is so calculated in many instances to disturb the possession of property which everybody believes to be finally settled, that it is necessary, in the interest of society, that it should receive the strictest possible construction. That I entirely adhere to, and I intend to apply that principle in the present case. Now, was this concealed fraud? The bill alleges, in the 45th paragraph, how the fact of Francis Fletcher Vane's illegitimacy was discovered. Then the bill states:—[His honor read the 46th paragraph]. Then the last three lines of the bill state "that the plaintiff has been hitherto kept out of possession and deprived of the said estates by a concealed fraud, which was not discovered, and could not with reasonable diligence have been discovered, by him before the year 1866." Now, therefore, considering, first, that the fraud had been committed, that the

27. The title of the plaintiff is a purely legal title; if he had taken proceedings within twenty years after the death of Sir Frederick they could only have been proceedings at *law, [391

facts were concealed by the father, the mother, and the brother, from the time of its being committed down to 1866, when it was discovered, I come to the conclusion, on the second point, that it was a concealed fraud. I do not know that, whatever "concealed fraud" is, it can be better stated than in the passage read from the judgment of Sir Richard Kindersley in *Petre v. Petre* (1 Drew, p. 397): [His honor read the passage.] *Sturgis v. Morse* (24 Beav., 541) also bears out that interpretation of the statute. That was a case where an insolvent designedly omitted from his schedule a reversion in fee to which he was entitled in certain property. It fell into possession shortly afterwards, and he took possession. He became bankrupt, and his assignees under the bankruptcy had possession of it, and after much more than twenty years had elapsed the assignee in insolvency filed a bill to recover it. The master of the rolls decided that there was a concealed fraud, which entitled the assignee in insolvency to recover. I am therefore of opinion that, according to the allegations of this bill, there was a fraud, and that it was a concealed fraud. So far the case cannot admit of doubt, but the real stress of the argument turns on this, that the time begins to run from the time when the concealed fraud "shall, or with reasonable diligence might, have been first known or discovered." Certainly, from the allegations in the bill, I must come to the conclusion that the plaintiff did not know of the fraud until 1866; but he must show that he is coming here within twenty years from the time when it could have been discovered by reasonable diligence. Now, it has been argued that the plaintiff might, by due diligence, have discovered these facts much more than twenty years ago. A good deal depends on circumstances. Is it the duty of a man to interrogate his father and mother as to the period of his birth? If the father and mother by their daily conduct are holding out an elder brother as the heir to the title and to the estates, is it any want of diligence on the part of a younger son not to inquire when his father and mother were married. Is it any part of the duty of

a son to suppose that his father and mother may be cheating him, and palming off an illegitimate child in the place of himself, who is legitimate? I say it is contrary to all usage of society, contrary to decency and propriety, that any son should for a moment allow himself to suppose that his father and mother could so treat him. I cannot think that there was any want of due diligence in his not inquiring at what precise date his father and mother were married, or when his brother was born, inasmuch as the father and mother, by every syllable they uttered, and by their everyday conduct, were holding him out as their heir-apparent, as their legitimate son, and the plaintiff was entitled to believe them in that statement. But then it is said there were illegitimate children, and although, as appears to have been felt by the learned counsel in support of the demurrer, a son would not in general be called on to make such an inquiry of his father and mother, yet, when it is known that some members of the family are legitimate and some illegitimate, there would not be so much impropriety in the son saying to the father and mother, "Which of my brothers and sisters were born before, and which after, your marriage? I know I was born ten years after marriage, because I know the date of your marriage; but when was Francis, my brother, born?" I confess, if I could come to the conclusion on the allegations in this bill that the plaintiff did know that his father and mother had had legitimate and also illegitimate children, it would greatly alter the state of things, and that which it would be, in my opinion, a gross impropriety to ask under one state of things would not be so in another state of things. But I cannot collect from the allegations in this bill that the plaintiff ever knew before 1866 that his father and mother had any child born before their marriage, and I firmly believe, from the allegations in this bill, that he was under the impression that his father and mother were married at a proper period, long before any child was born, and believed every member of the family to be legitimate. Under these circumstances, I cannot think there was any want of due

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and lapse of time cannot make the case one for a court of equity. We say that the section only applies where the estate has been acquired by means of a fraud so as to make a suit in

diligence on his part in not making inquiries on that subject. Then, as to the entry in the parish register, I think that, from the allegations of the bill, it is plain that he had never seen this entry, nor had anybody on his behalf until after 1866. Therefore I am unable to discover that there was any want of due diligence on the part of the plaintiff.

Now, these three conclusions, first, that this has been a fraud; secondly, that a fraud has been concealed; and, thirdly, that by reasonable diligence the plaintiff could not have discovered it until within the last twenty years, or, in other words, he has not been guilty of want of reasonable diligence, would entitle him to recover these estates but for the points I am about to mention. The question was raised whether this is not a mere ejectment bill which cannot be properly brought in this court. As "fraud" is involved in the case it is properly brought in this court. Sir R. Baggallay waived the objection on that ground, and therefore I must take it as being properly in equity instead of being at law, as it might have been. The jurisdiction is concurrent. The only remaining question is one which will become most important in a further stage of the cause, viz., whether as against the defendant, the present owner of this estate, the plaintiff can recover these estates. It is urged that the defendant, the present owner, claiming under the settlement of 1823, is a purchaser for value and without notice, or, in other words, that he is entitled to the protection of the latter part of the proviso of the 26th section. I have heard a very elaborate and learned argument upon the question as to who, in a marriage settlement, is the purchaser for valuable consideration. It is clear that the husband Francis, the illegitimate son, was not a purchaser under the settlement of 1823. I quite agree with the argument of the solicitor general, that in this case the wife was the purchaser for herself and her issue. It is a very material question, this being a demurrer, whether I can enter into the question of purchase for valuable consideration without notice. I invited the learned counsel to give me authority that it has ever been so decided, and all that they could say was,

that where it appears on the face of the bill that the defendant is a purchaser for valuable consideration without notice, a demurrer must necessarily lie; but no plaintiff desiring to recover against a person in possession would allege that he is a purchaser for valuable consideration without notice. Therefore the case never has occurred, and never can occur. The question as to being a purchaser for valuable consideration without notice is a proper subject of plea or answer, but there is no instance that I know of where it has ever been raised upon demurrer. But can I, on the allegations of this bill, consider Lady Diana and her issue as purchasers for valuable consideration without notice? First of all, it must be plain that if she knew of the fraud committed in 1823 (and according to the extraordinary allegations of this bill she and her father both knew that she was going to marry an illegitimate son, who had no kind of title to the estate), it is quite clear she cannot be permitted to retain any benefit she took for herself under the settlement. Then, can she purchase for her children? Can they be purchasers for valuable consideration? It is perfectly clear the children were not purchasers. I agree the parent is a purchaser for herself and them. I apprehend that if the parent's title is affected, the title of the children is affected also. I was referred to the case of *Le Neve v. Le Neve* (Amb. 436), where a man executed marriage articles in favor of his first wife and his issue by that wife. He survived that wife and married again, and a settlement was executed on the second wife. The second wife knew nothing whatever of the articles executed on the first marriage, but her agent did. Lord Hardwicke decided there, that inasmuch as the agent knew, she knew, and that what deprived her of title deprived her issue of title also. Accordingly, in *Toulmin v. Steere* (3 Mer., 222), Sir W. Grant says: "In the case of *Le Neve v. Le Neve* the interest of the unborn children was not attempted to be distinguished from that of the mother. The only question was, whether she had notice or not of the prior articles and it being held that she was affected by her agent's knowledge of those articles, all the trusts of the second settle-

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*equity maintainable from the first. This does not apply [392 to a fraudulent concealment of title. [The LORD JUSTICE JAMES referred to Shelford's Real Property *Statutes ⁽¹⁾, and [393 *Petre v. Petre* ⁽²⁾ and *Dean v. Thwaite* ⁽³⁾ there cited.] But, supposing the clause does apply, we say that all persons claiming as purchasers under the settlement of 1823 are within the saving.

ment, one of which was for the issue of the marriage, were postponed to those of the articles on the first marriage. Were it otherwise, a man would only have to purchase on behalf of infants to free an estate from all equitable incumbrances to which it might be subject." If, therefore, the proper interpretation of this bill is that which Sir R. Baggallay so strenuously contended for in his reply, viz., that it was only her father that had notice, still, as the bill alleges that her father was her agent, his knowledge would be her knowledge, and would, according to *Le Neve v. Le Neve*, be fatal to her title and equally fatal to the title of her issue, the present baronet, now in possession. I think, however, that the fair interpretation of the language of par. 31 is, that she herself had notice, because the allegation is that the defendant Diana Olivia Vane had, through the said Charles George Beauchamp, or otherwise, full notice. I have no doubt, when an answer is put in, it will turn out that this allegation is utterly wrong; but for the present purpose I am bound to take it as correct. She had, therefore, direct notice of the fraud, and having direct notice of the fraud, neither she nor her children, on whose behalf she purchased, can retain any benefit from that purchase. It is not, therefore, necessary to go into the question whether constructive notice would be sufficient. Counsel reminded me that the word "notice" was not used in this section, and I am inclined to think that the very difficult doctrine of a court of equity, as to implied notice, is purposely excluded. I think in these cases it must be positive notice, the person must know. But Lady Diana, according to the allegations of this bill, did positively know that the gentleman she was about to marry was illegitimate, and had no title to the estates. On these grounds, having heard the arguments on both sides, I concur in the arguments submitted on the part of the plaintiff. On the allegations of this bill, I can neither take Lady Diana nor her son, the de-

murring parties, to be purchasers for valuable consideration without notice. I think it is to be regretted that this case was brought on to be heard on demurrer, because I have no doubt the facts will turn out, when they are investigated, to be very different to what they appear in the bill, although, on the main fact of the illegitimacy of Sir Francis, I cannot for one moment believe, for the honor of the professional advisers and everybody else concerned, that there can be the slightest doubt of the fact of his illegitimacy, because, if the parties had been in a situation to prove that he was legitimate, the plaintiff's conduct in filing this bill alleging the illegitimacy, accusing his father and mother and brother of this deliberate fraud to cheat him, is reprehensible to the last degree. I cannot believe he would have brought forward such a case unless he had well ascertained that his brother Francis was illegitimate. I cannot possibly believe that the advisers of these defendants would ever have allowed this case to be discussed in open court for two days on the assumption of the illegitimacy of Francis, if they were in a position to prove, that which they said at the bar they could prove, that in point of fact he was legitimate. At all events, by overruling the demurrer, I give them the opportunity of proving that fact. The parties who were concerned in this fraud are now gone. It was the fraud of the father, the mother, and Francis, who has been dead more than thirty years. The present defendants are in no way implicated in this fraud, except that the bill alleges, and I have no doubt, I repeat, erroneously, that Lady Diana knew of it. I have no doubt it will turn out that she knew nothing about it, and had no more suspicion of it than the plaintiff himself. I take it, for this purpose, that all the parties are innocent. The result is that it is my duty to overrule these demurrers.

⁽¹⁾ 7th Ed., p. 223.

⁽²⁾ 1 Drew., 371, 397.

⁽³⁾ 21 Beav., 621.

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The word "notice" does not occur. What is required to affect a purchaser is knowledge or reason to believe. This denotes something personal, but the bill only alleges constructive notice through the wife's father, which does not satisfy the terms of the act. *Thompson v. Cartwright* (*) furnishes a strong analogy. 394] *Then, as regards Sir Henry and his wife, we say that Sir Henry's twenty years' possession makes a good bar. Why should he, who was no party to the fraud, be in a worse position than if he had entered as a squatter with no title at all? There was no such fraud as would have prevented a fine by him; with five years' non-claim, from giving him a good title under the old law: *Langley v. Fisher* (2); *Bell v. Bell* (3). But if the court be against us on these points, we say that the plaintiff might, with reasonable diligence, have discovered the fraud more than twenty years ago: *Chetham v. Hoare* (4). He knew that some of the children were illegitimate, and was put upon inquiry.

The *Solicitor General* (Sir G. Jessel), and Mr. Glasse, Q.C. (Mr. Smart with them), for the plaintiff: The allegations as to the plaintiff's having nothing to lead him to suspicion till 1866 cannot be got over on demurrer. [The LORD JUSTICE MELLISH: Could a court of equity have entertained this bill within twenty years from Sir Frederick's death?] Yes. It alleges the existence of an outstanding term, which alone would prevent the bill from being demurrable within that period. But we rest the right to equitable interference on this ground, that a court of equity has jurisdiction to relieve against any fraud, and no reason can be given why a court of equity, which clearly would interfere when a person has through fraud got a legal title by means of conveyance, should decline to interfere when he has through fraud got a legal title by means of the Statute of Limitations. It does not signify that the person against whom the relief is sought was not privy to the fraud: *Charter v. Trevelyan* (5); he is not protected unless he can defend himself as a purchaser for value without notice, or under the analogous statutory provisions in sect. 26. Under the statute the defendant is only protected if he is, or claims under, a *bonâ fide* purchaser. Now, no one is a *bonâ fide* purchaser whose agent had 395] notice of the adverse *title: *Le Neve v. Le Neve* (6); *Rolland v. Hart* (7); *Dean v. Thwaite* (8). [The LORD JUSTICE JAMES referred to *Bridgman v. Green* (9).] The provision in sect. 26 was intended to preserve the equitable doctrine as to fraud, and what was understood to be appears from the first report of the Commission-

(*) 2 D. J. & S., 10.

(*) 9 Beav., 90.

(*) Lloyd & G. temp., Plunkett, 44.

(*) Law Rep., 9 Eq., 571.

(*) 4 L. J. (Ch.), 209; 11 Cl. & F., 714.

(*) 2 Tud. L. C. in Eq., 4th Ed., 35; Amb., 436; 3 Atk., 646.

(*) Law Rep. 6 Ch., 678.

(*) 21 Beav., 621.

(*) Wilmot's Notes, 58.

ers on the Law of Real Property (¹). Knowledge of the agent is treated as knowledge of the principal: *Rolland v. Hart*. It is not mere constructive notice; and paragraph 31 of the bill completely prevents the defendants from availing themselves on demurrer of the defense of purchase.

Mr. *Pearson*, in reply.

Jan. 18. SIR W. M. JAMES, L.J., delivered the judgment of the court: In this case the only question we have to determine is whether the defendants ought or ought not to put in answer to the plaintiff's allegations. The court has nothing now to do with the probability or improbability of the plaintiff's story, with the probability or improbability of his ultimate success at the hearing, nor with any considerations of the hardship to the defendants, a widow and son, themselves innocent, in that they are called on to meet a case of fraud alleged to have been originally committed generations ago by persons who have been dead many years.

The plaintiff's case must for this purpose be taken to be true as stated by him. His case is, that under a family settlement certain estates stood limited to the use of his father for life, with remainder to the eldest son in tail, that he was such eldest son, and that on the death of his father the estates became in law vested in him, but that he was deprived of them by the following fraudulent contrivance: His father, according to his story, had lived with his mother as his mistress before their marriage, but she being with child he determined to marry her, and intended to marry her before the *birth of such child. Before, [396 however, the marriage could be celebrated she was confined. The marriage took place some short time afterwards, and it was then agreed between the husband and the wife to prevent the child suffering from the untoward accident of its premature birth by falsifying the date of such birth and representing it as having taken place after the marriage. This was done, and that child was accordingly produced, represented, and treated as being the legitimate son, the eldest son, and the heir in tail of the settled property. Some years afterwards the plaintiff himself was born, being, as he says, the real eldest son and heir in tail, but brought up as if he were only a younger child, and kept in ignorance of the real facts as to his position and right. When the suppositious child attained his majority he was informed of the fact that he was illegitimate, and with this knowledge the father and himself went through the form of suffering a common recovery in the character of tenant for life and tenant in tail in remainder to such uses as they should jointly appoint.

(¹) Page 49.

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A joint appointment was made, and afterwards, under a marriage settlement, the property was expressed to be limited to uses in favor of the demurring defendants, the widow and eldest son of the suppositious heir.

The plaintiff alleges that until a few years ago he was wholly ignorant of the deception which had been practiced, and he has now filed his bill, contending that he is entitled to the assistance of a court of equity to be placed in possession of the estates, as estates of which he has been deprived by a concealed fraud. Unless his case is affected by lapse of time by the operation of the Statute of Limitations, or by some countervailing equity on the part of the defendants, that case would seem to be a perfectly clear one. It is as gross a fraud as could well be conceived. It was, indeed, attempted to be argued that, as the plaintiff's right was a clear legal right which became vested in him at his father's death, with no legal bar or impediment to prevent his taking possession of or recovering the estates, and the defendant's possession originating in a mere trespass, being, in point of law, mere squatting on the property, this court would not interfere. The solicitor-general gave one, perhaps, sufficient answer to this contention, viz., that the bill alleges the existence 397] of an *outstanding unsatisfied term of years. But we do not think it well to leave it to that answer. We think it right to say that the contention would, in our judgment, have equally failed if there had been no outstanding term. It was assumed in the argument that a mere squatter would have had a good defense from sufficient length of possession. We are of opinion that the law gives no special privilege to the length of squatting possession. It must always be borne in mind that in all questions under the Statute of Limitations this court has nothing to do with the nature, origin, or duration of the defendants' possession, but simply whether the plaintiff has or has not proceeded in due time after the accruer, or that which is to be taken to be the accruer, of his right of suit. An estate may have been enjoyed as a fee simple estate for generations through any numbers of devolutions or dispositions, or may have been held by squatters successively for many years, without creating any bar to the proceedings of a rightful owner under a title newly accrued. And there is not, in our judgment, in this respect any difference whether the accruer is on the determination of a previous estate or on the discovery of a concealed fraud. It is right also to notice that the possession in this case is not the possession of trespassers. The suppositious son got into actual possession as owner by means of the fraud, and the possession of the defendants was a possession not only apparently derived from him, but was, against all the world but the plaintiff.

iff, a possession under a valid title really derived from him. Although the contention we have disposed of as to the legal estate was raised, the counsel for the defendants admitted, as they were in fact compelled to admit, that if the supposititious son himself were now alive it would be impossible for him effectually to contend that this court would allow him to avail himself of the legal bar arising from the length of his fraudulent possession. And it was also conceded that this court will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but, to use Lord Cottenham's language, from his children and his children's children, or, as was said in *Huguenin v. Baseley* ⁽¹⁾ and *Bridgeman v. Green* ⁽²⁾, from any persons amongst whom he may have parcelled out the fruits of his fraud.

*It appeared to us, therefore, throughout this case that [398 the real question is as to the true meaning of the 26th section of the Statute of Limitations. On this two contentions were raised. First, that the plaintiff had not alleged a sufficient title under the positive enactment in that section. Secondly, that the defendants were within the protection of the proviso in favor of purchasers. As to the first, there does not seem to us to be any real doubt or question. It is difficult to conceive what would be a concealed fraud, if what is here alleged is not, namely, that a person is induced, by a deception practiced on him from his earliest knowledge, to believe that he was only a younger when he was the eldest son, or how a person could be more effectually deprived by fraud of his estate than by his being designedly, by the persistent falsehood and deceit of those about him, kept in ignorance of his birthright, and so prevented from claiming it. The statute, indeed, says that a claimant must proceed within twenty years after he discovered, or might with reasonable diligence have discovered, the fraud. The plaintiff alleges in so many words that he never did know or suspect, until the recent time mentioned by him, anything of the alleged fraud; and that we must take to be true, unless we are enabled judicially to conclude from other statements of his in the bill that that allegation is false, or that he might with reasonable diligence have discovered the fraud. We are unable to find in the bill any such statement or anything to show any want of reasonable diligence on his part in ascertaining the truth. That brings us to the remaining and real point, whether the bill shows that the defendants are protected by the proviso. One matter relating to this was not argued before us, which we, however, think it right not to pass wholly unnoticed, viz. : we desire not to express any opinion as to whether the defense of a *bonâ fide* purchaser for valuable consideration, without knowledge of or reason to be-

(1) 14 Ves., 278.

(2) Wilmot's Notes, 58.

lieve the fraud alleged, can be raised by demurrer, or otherwise than by a plea verified by the oath of the defendant. The case was argued before us, however, so as to raise the real substantial question whether the proviso means the actual personal knowledge of the purchaser, or whether under it the actual knowledge of the agent is to be deemed and taken to be the knowledge of the purchaser.

399] *It was contended by the solicitor-general that the only person protected was a *bonâ fide* purchaser, and that we ought, on the authority of Lord Hardwicke, to hold that a person is not a *bonâ fide* purchaser whose agent was affected with notice of that which should have prevented his purchasing. In this proviso, however, we think that the words "*bonâ fide*" were introduced altogether for a different purpose and with a different meaning, that it was meant that the purchaser should be really a purchaser, and not merely a donee taking a gift under the form of a purchase. For example, a person might take an assignment of a leasehold in consideration of covenants to pay the rent and perform all the covenants—might take a conveyance of a mortgaged estate in consideration of his paying off the mortgage. These might be *bonâ fide* purchasers, or they might, according to the facts, be in truth and substance volunteers receiving a gift of a valuable chattel real or a valuable estate incumbered. It would be easy to suggest many other circumstances by which it might be shown that an apparent purchaser had not entered into the transaction honestly and substantially as a purchaser, but in some other character, or for some indirect purpose. And we conceive that it was with reference to that class of cases the words "*bonâ fide*" were introduced here, and that they were not meant to include and cover all, and more than all, that is afterwards expressed in the remainder of the proviso. What, then, is the legal meaning and effect of that which is so afterwards expressed? At the time this statute was passed it had undoubtedly been held by the highest authority that the actual knowledge of the agent through whom an estate is acquired is in this court equivalent to the actual personal knowledge of the principal. This is also in accordance with the invariable course of decisions at common law in regard to purchases of chattels. No one dealing through an agent is ever permitted to allege himself ignorant of that which is actually communicated to the agent in the course of the transaction. The agent in the matter, and in the course of the transaction acting within the limits of his agency, is the *alter ego* of the principal. It appears to us beyond all question that, as the law of this court stood when the statute was passed, the knowledge of the purchaser's agent acquired in the course of the transaction

was *for all purposes treated as the knowledge of the [400 principal. It is also, we conceive, beyond question that in every other case, except under this section, this court would treat the knowledge of the purchaser's agent as the knowledge of the purchaser. Was it then meant to make such a material alteration of the law? It is said in support of that (and not without force) that the words well known in this court, "purchaser for valuable consideration without notice," were designedly not used, and that the words "who had not participated in the fraud, and did not know, and had no reason to believe," were designedly introduced so that only those purchasers should be affected who had actual knowledge, and who were in truth making themselves morally accomplices in the fraud, in fact receivers of stolen goods. But we think that what the legislature meant to do was to exclude that constructive notice which had certainly been carried to a very startling extent in many instances, and that it did not mean to subvert, in respect of one small portion of the law of this court, the well-settled principles and rules on which all the courts have acted in respect of the relation of principal and agent, and in respect of the extent to which the knowledge of the latter is deemed to be the knowledge of the former. The courts had, in fact, held, almost in so many words, that what the agent knows the principal knows, that the knowledge of the agent was sufficient to create *mala fides* in the principal; and we think it, therefore, reasonable to hold that the legislature used the words in the same sense, and that when they said "who did not know or had not reason to believe," they meant "who did not know or had not reason to believe, either by himself or by some agent whose knowledge or reason to believe is by settled law deemed and taken to be his." We think it would lead to very startling consequences if any other interpretation were put on the clause. It is obvious that if actual personal knowledge were required every corporation or joint stock company might acquire a good title to property, although its officers and solicitors were perfectly conversant with the grossest fraud perpetrated by the vendor; and in fact any person might deal with impunity in the purchase of what is in substance stolen property, provided he takes care to leave the whole dealing from first to last in the hands of his agent.

*We have arrived, therefore, at the conclusion that the [401 averment in the 30th paragraph of the bill, that the father, as the agent of and on behalf, of his daughter, negotiated the marriage settlement with full knowledge that her intended husband was illegitimate, and had no interest in the devised estates, is a sufficient averment to preclude the daughter from setting

up the bar of purchase for valuable consideration under the 26th section of the act, and that the son, who only claims through the same settlements, is in the same position, and is equally affected with knowledge through the knowledge of his mother's father and agent. It appeared to us at the close of the argument that, as the whole of the plaintiff's case against the defendants appears to rest on the averments of the father's agency and the father's knowledge, it might be right to allow the defendants to traverse that averment by plea. But as such a plea must be accompanied by an answer giving discovery as to everything that may be material to that issue, we think that there is no sufficient advantage to warrant that which is an unusual course, and that the defendants must proceed in the usual way to meet the case by answer. The result is the appeals must be dismissed, and of course with costs.

Solicitors: Messrs. *Belfrage & Middleton*; Messrs. *Sharp & Ullithorne*.

[Law Reports, 8 Chancery Appeals, 401.]

LJJ. Jan. 18, 1873.

MARTIN v. HOBSON.

Legacy—Will—Construction—“Sum and Sums of Money owing to me”—Words.

A testatrix made a specific disposition of certain property, including “all sum and sums of money which shall be due and owing to me at the time of my decease,” and gave the residue of her personal estate to other persons. At the time of her death in 1781, she was one of the two next of kin of her son, who had died intestate in 1778. The son was the residuary legatee of his father, who had died in 1778. In 1800 a decree was made for taking the accounts of a partnership in which the father had been engaged, and which had been dissolved by the death of the other partner a few months before the father's death. In 1820 the representatives of the surviving executor of the father paid into court in this suit a sum [402] of money on account of what was due from the executor to the father's estate in respect of moneys coming from the partnership. Nothing was shown as to the state of the partnership assets or of the estates of the father or son at the time of the death of the testatrix:

Held (affirming the decision of the master of the rolls), that the moiety of the testatrix in the fund in question did not pass under the gift of “sums of money due and owing to me at the time of my decease;” but under the residuary bequest, it not being shown that the assets were at her death in such a state that her share could be treated as a sum of money then owing to her.

Bainbridge v. Bainbridge (?) distinguished.

THIS was an appeal from a decision of the master of the rolls on a petition for payment out of a fund in court.

Mary Christian, of Antigua, widow, by will dated the 14th of February, 1781, and proved on the 28th of the same month, after bequeathing two pecuniary legacies, gave to trustees the

residue of her real and personal estate "upon trust to collect and get in all sum and sums of money which shall be due and owing to me at the time of my decease, and also to sell and dispose for the best price that can be got for the same all stock, sugar, rum and other effects belonging to me, and the money arising from such debts, effects, and other the above mentioned premises to lay out and invest on," &c. She then declared trusts of the fund so invested for her daughter Margaret Gunthorpe for life, and after her death upon trusts under which, in the event which happened, Margaret Gunthorpe's two children became entitled in equal shares. She then directed the trustees to stand possessed of her negroes upon the trusts therein declared, being trusts for Mrs. Gunthorpe for life, with similar limitations over in favor of Mrs. Gunthorpe's children. She then bequeathed certain pecuniary legacies, and concluded: "all the rest and residue of my estate of what nature soever, I give to my daughter the said Mrs. Gunthorpe, her heirs and assigns." The testatrix, Mary Christian, and her daughter, Mrs. Gunthorpe, were the two next of kin of Matthew Christian, who had died intestate in 1778. Matthew Christian was the residuary legatee of Mary Christian's husband, Robert Christian, who had died in 1776. The fund in court formed part of the residuary estate of Robert Christian, and the question now was, whether *Mary Christian's share of it [403 was to be treated as included in the disposition of "sum and sums of money due and owing to me," or as having passed under the residuary bequest in her will.

The circumstances under which the fund arose were, so far as was known, the following: Robert Christian, of Antigua, by will made in October, 1775, gave to his daughter, Mrs. Gunthorpe, then a spinster, a legacy of £6000, which he directed to be paid out of his share of the property of the partnership existing between him and John Smith, and if that was not sufficient then out of his other real and personal estate; and he gave the residue of his realty and personalty to his son Matthew Christian absolutely. By a codicil dated the 2d of May, 1776, he noticed that John Smith had died, and gave some further directions about the legacy, under which, in the events which happened, £5000 of it became payable on the marriage of his daughter, and the remaining £1000 at the expiration of a year from his decease, the directions being continued that the sums should be primarily payable out of his share in the partnership property, and if that was insufficient, out of his other real and personal estate. He died in 1776, and the marriage of his daughter was solemnized soon afterwards. Matthew Christian died in 1778, intestate, leaving his mother, Mary

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Christian, and his sister, Mrs. Gunthorpe, his next of kin. At the testator's death the partnership accounts were unsettled. Mr. and Mrs. Gunthorpe filed their bill in the Court of Chancery in Antigua against Robert Christian's executors, to obtain payment of the £6000. Before this suit came to a hearing the testator's real estates in Antigua were sold by auction, and a supplemental bill was filed against the purchasers. On the 18th of April, 1782, the causes came on to be heard, and it was ordered by consent that the purchasers should pay to Mr. and Mrs. Gunthorpe the amount of the legacies of £5000 and £1000, and that the legacies should be assigned to trustees. The purchasers accordingly paid the £6000 to Mr. and Mrs. Gunthorpe, and Mr. and Mrs. Gunthorpe assigned the legacies to trustees. After this the present suit of *Martin v. Hobson* was instituted by the trustees, to whom the legacies had been assigned, against Hobson, the surviving executor of John Smith, Casamajor, the 404] *surviving executor of Robert Christian, the executors of a deceased executor of Robert Christian, and an administrator *ad litem* of Matthew Christian, to take the accounts of the partnership and to have the legacies paid out of Robert Christian's share; and in December, 1800, a decree was made for taking those accounts.

On the 8th of November, 1804, the master reported that the estate of Smith was indebted to the partnership more than the estate of Robert Christian was by the sum of £5469, so that upon payment of that sum to Casamajor out of the partnership property the estates would be on an equality, and would be entitled to an equal division of the residue of the partnership property.

By an order dated the 16th of March, 1818, it was ordered that Casamajor should pay into court £6388 to the credit of the cause, "the separate account of Robert Christian," that the costs should be taxed and paid out of £13,432 consols standing to the credit of the cause, and that the residue of that sum should be carried over to the separate account of Robert Christian; and an inquiry was directed as to debts and legacies of Robert Christian. By a subsequent order in 1818 the surviving plaintiff was declared entitled to be paid the legacies and interest out of the moneys which then were or should thereafter be standing to the separate account of Robert Christian. The fund in court, after payment of costs, was accordingly applied in payment of the legacies, leaving a balance of £316 due. In 1820, Casamajor having died indebted to the estate, his children paid into court in the cause the sum of £2364 in respect of what was due from him. Out of this sum the balance remaining due in respect of the legacies was paid, and by

an order made in 1824 the residue was invested in £2339 consols, "the account of the separate estate of Robert Christian." The existence of this fund was forgotten till 1860, when an arrear of dividends amounting to £2096 had accrued upon it.

Some of the respondents then presented a petition praying for a division of the fund, on the supposition that it passed under the gift in Mary Christian's will to Mrs. Gunthorpe for life with remainder to her children. The petition was adjourned into Chambers, and proceedings went on at great length to ascertain the parties entitled. Before any certificate had been made another petition was presented, by which the respondents claimed the whole *fund as having passed [405 under the residuary gift to Mrs. Gunthorpe. In July 1872, a certificate was made finding who were the parties entitled on either view of the construction of the will, and on the 29th of July, 1872, the master of the rolls decided that the respondents in this appeal were entitled to the whole fund. This appeal was presented by a party who was found to be entitled to a share if the fund was comprised in the gift to Mrs. Gunthorpe for life.

Mr. *Southgate*, Q.C., and Mr. *Cadman Jones*, for the appellant: We contend that everything which the testatrix Mrs. Christian had a present right to receive, and which could only come to her in the shape of money, falls within the description of "sums of money due and owing to me." This was money which, so far as appears, came out of the assets of a partnership, and therefore never could have come to her but as money. The case is stronger than *Bainbridge v. Bainbridge* (¹).

Mr. *Roxburgh*, Q.C., and Mr. *Caldecott*, for the respondents: The burden of proof is on the appellant to show that this fund does not pass under the residuary gift. To do this he must make out that at the time of the death of the testatrix it came under the description of a sum of money owing to her. For anything that appears it may have been in the shape of leaseholds or real estate at that time.

Mr. *Cadman Jones*, in reply.

SIR W. M. JAMES, L.J.: In this case the burden of proof lies on the appellant, who has to make out that the fund in dispute passed under the gift of "all sum and sums of money which shall be due and owing to me at the time of my decease." We know nothing further than this: that long after the death of the testatrix a sum of money came in, which appears to have arisen from Robert Christian's share in a partnership business; but we knew nothing of the state of the assets, either of Robert Christian or of Matthew Christian, at the *time of the [406 death of the testatrix. Under these circumstances, it is not made

(¹) 9 Sim., 16.

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out to our satisfaction that this was a sum of money due and owing at her death. In *Bainbridge v. Bainbridge* ⁽¹⁾ the *ratio decidendi* evidently was, that the estate had been got in by the executor so as to constitute a debt due from him.

SIR G. MELLISH, L.J. : I am of the same opinion. I think it very likely that the expression "sum and sums of money due and owing to me" would be held to extend beyond debts properly so-called, and might include all sums of money which there was a present right to receive, though the administrations which were necessary to be taken out before they could be received had not been taken out. But in order to come within this description the subject must be something which at the death of the testatrix could be described as a sum of money. Here, what the testatrix had, was a distributive share in the residuary personal estate of the son, who was entitled as residuary legatee to the residue of his father's estate, including the father's share in the assets of a partnership. These assets, for anything we know to the contrary, may at the death of the testatrix have consisted of real estate, and we do not think that her interest in the moneys arising from their subsequent sale can be considered a sum of money due and owing to her at her death.

Solicitors: Mr. *Ellerton*; Messrs. *Edmonds & Mayhew*.

[Law Reports, 8 Chancery Appeals, 407.]

L.JJ. Jan. 25, 1873.

407] **In re* HARMONY AND MONTAGUE TIN AND COPPER MINING COMPANY.

SPARGO'S CASE.

Company—Subscriber to Memorandum—Paid-up Shares—Payment in Cash—Companies Act, 1867 (30 & 31 Vict. c. 181), s. 25.

Any *bond fide* transaction between a company and a shareholder which, if the company brought an action against him for calls, would support a plea of payment, is "payment in cash" within sect. 25 of the Companies Act, 1867.

S. took shares in a company formed for working a mine which he sold to them. The whole nominal amount of the shares was immediately payable, as was also the purchase-money of the property. It was agreed between S. and the company that he should be credited in account with the price of the property, and debited with the amount payable on his shares; and the balance of the account thus made out was shortly afterwards exactly balanced by cash payments by S.:

Held (reversing the decision of the vice warden of the Stannaries), that S. must be considered as having paid up his calls in cash.

THIS was an appeal motion by Thomas Spargo from an order of the vice-warden of the Stannaries ordering him to pay to the registrar, as liquidator of the company, £450, the amount originally payable in respect of nine shares for which he was settled on the list of contributories, and ordering him to pay a balance alleged to be

(1) 9 Sim., 16.

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due from him in respect of forty-two other shares of which he had been the holder, but which he had long since disposed of.

Michell and Stephens were licensees of a sett for twelve months from the 28th of January, 1871, with the right at any time within that period to call for a lease for twenty-one years. They and Spargo entered into arrangements for promoting a company to work this mine, and determined that its capital should be £3200, in sixty-four shares of £50 each; £16 per share to go for working capital, and £34 per share for the purchase of the mine, treating it as worth £2176. A company for that purpose was accordingly registered on the 9th of March, 1871, under the above name. The capital was stated by the memorandum of association to be £3200, in sixty-four shares of £50 each. Spargo subscribed the memorandum for thirty-one shares, two other persons for two *shares each, and the remaining four subscribers for one [408 share each. Neither Michell nor Stephens was a subscriber.

On the 16th of March, 1871, a meeting was held, at which all the seven subscribers were present, and at which the following resolutions were passed unanimously: "That the sum of £2176 be credited Mr. Thomas Spargo for the lease, &c., of the property, and that the same be paid out of the share capital of the company. That Mr. T. Spargo be and is hereby appointed the manager of the company. That Mr. F. H. Hearn be and is hereby appointed the secretary to the company. That the statement of accounts produced to this meeting be allowed and passed; balance in favor, £989 11s. 6d. That Mr. Spargo, as manager, issue certificates for shares in the company as follows." Then followed, first, the names of the seven subscribers to the memorandum, with the numbers of shares for which they had respectively subscribed it set against their respective names; next, the names of three persons who had applied for shares, amounting to five in all; and lastly, the name of Spargo, with the balance of twenty shares set against it. From the account kept in the books of the company it appeared that all the shares except Spargo's were fully paid up in cash in March, 1871. Spargo's account stood as follows in the ledger:

1871.	DR.	£	s.	d.	1871.	CR.	£	s.	d.
Mar.	To share capital,				Feb. 16	By cash	3	10	0
	81 shares, signed				28	Ditto	25	0	0
	for in mdum. ..	1550	0	0	Mar. 8	Ditto	6	18	6
	Ditto 20 taken at					Purchase of lease			
	meeting	1000	0	0		of mine	2176	0	0
					Sept.	Salaries s/c ..	63	0	0
						Sundry charges	75	0	0
					Aug. 5	Cash	150	0	0
					Sept.	Ditto	51	11	6
		<u>£2550</u>	<u>0</u>	<u>0</u>			<u>£2550</u>	<u>0</u>	<u>0</u>

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1871.				£	s.	d.	1871.				£	s.	d.
Nov.	To cash	45	13	8	Nov.	By rent a/c	..	37	10	0	
Dec.	Wages due at mine			25	0	0		Salaries a/c	..	81	10	0	
							Dec.	Rent a/c	..	4	3	4	
								Salaries a/c	..	10	10	0	

After the above meeting Spargo, at different times, disposed of a number of his shares at a premium. A Mr. Riddell took twelve 409] *of them in August, 1871, and subsequently acquired six more shares. The next general meeting was held on the 13th of September, when Mr. Riddell and three other persons were elected directors. Part of the minutes was as follows: "Mr. Spargo submitted the balance sheet, and a discussion arose thereon respecting the sum of £2176 charged for purchase of the lease, which it appeared had not yet been transferred to the company. It appeared, also, that by an agreement entered into in August last, between Mr. Spargo and Captains Stephens and Michell, Mr. Spargo was to receive one half that sum for bringing out the company, the remaining half to be divided equally between Captains Stephens and Michell. It was ultimately proposed and agreed that Mr. Spargo should forthwith pay £543 in cash and execute a transfer of twenty shares to the company as a security for the transfer of the lease, the company undertaking to settle with Captains Stephens and Michell out of the said money and shares, and to pay the balance in new shares and money to Mr. Spargo."

Resolutions were then passed for increasing the capital of the company to £10,000 by the issue of new shares; and rules and regulations were adopted in the place of those in Table A. to the Companies Act, 1862. Spargo handed over the £543, and transferred shares, according to the arrangement mentioned in the minute. No lease, however, was ever granted, difficulties having been raised as to its form on the part of the lessees. No new shares were ever issued in pursuance of the resolutions at the September meeting, and the company having proved a failure an order for winding it up was obtained on the 21st of December, 1871. Spargo was placed on the list of contributories for nine shares, being all that were standing in his name at the commencement of the winding up.

In February, 1872, the registrar, as liquidator, applied for an order under sect. 165 of the Companies Act, 1862, for Spargo to pay into court £1633, alleged to have been retained by him out of the assets of the company, and the above mentioned sum of £2176. The vice warden refused the application, and there was no appeal from his decision. The registrar then applied 410] for an order upon Spargo to pay *into court £450, being £50 per share on the nine shares in respect of which he was on the list of contributories; and also to pay into court £893, be-

ing the balance of £50 per share on the forty-two other shares taken by Spargo, after deducting £1207, the amount of the moneys which the registrar computed to have been paid by Spargo on behalf of the company. The vice warden made the order asked for, and Spargo appealed.

Mr. *Roxburgh*, Q.C., and Mr. *Woodroffe*, for the appellant: Spargo can only be made liable as an officer of the company who has misconducted himself, or as a contributory. An attempt to charge him on the former ground has failed, he therefore can only be attacked as a shareholder past or present. But the case cannot be dealt with on the former ground, for no list of past members has been settled. Then, how can he be liable as a present member for those shares with which he has parted, and in respect of which other persons are on the list of contributories? [The LORD JUSTICE MELLISH: It appears to me that you must show your shares to have been fully paid up. When you take shares you become bound to pay cash for them. If you do not do so, and the company nevertheless registers them in your name as fully paid up, and you sell them to *bonâ fide* holders as fully paid up shares, they are not liable to pay calls on them; but how is your original liability to pay got rid of?] They were fully paid up. The company was under a present obligation to pay for the mine, Spargo under a present obligation to pay for his shares. The two were set off, and if Spargo had been sued at law the facts would have supported a plea of payment, and the Companies Act, 1867, sect. 25, is satisfied: *Fothergill's Case* ⁽¹⁾.

[They also referred to *Waterhouse v. Jamieson* ⁽²⁾.]

Mr. *Fry*, Q.C., and Mr. *Joseph Dixon*, *contra*: We contend that under the act of 1867 Spargo is liable on all the shares he took, no memorandum such as is required by the *act [411] having been registered. The act requires that if there be no such memorandum the shares shall be paid up in cash. [The LORD JUSTICE MELLISH: In *Fothergill's Case* ⁽¹⁾ both the lord chancellor and I thought that anything which would support a plea of payment would be enough.] We cannot say that what was done here would not support a plea of payment; but does it amount to payment in cash? If it does, the act of 1867, sect. 25, has not altered the law. *Cleland's Case* ⁽³⁾ shows the opinion of Vice Chancellor Wickens, that the cancellation of a debt arising from the sale of property to the company is not enough. The case is substantially one of shares allotted as fully paid up. As to the shares in respect of which Spargo was no longer on the register at the commencement of the winding up,

⁽¹⁾ *Ante*, p. 270.

⁽²⁾ *Law Rep.*, 2 H. L. Sc., 29.

⁽³⁾ *Law Rep.*, 14 Eq., 187.

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it is true that he cannot be called upon as a contributory, but he is under a liability to the company for not having paid them up; and under the Companies Act, 1862, s. 101, when a person is on the list as a contributory the court has jurisdiction to settle all matters depending between him and the company: *Stringer's Case* ⁽¹⁾.

SIR W. M. JAMES, L.J.: I am of opinion in this case that the order of the vice warden cannot stand. The question turns upon what is the true intent and meaning of the 25th section of the Companies Act, 1867, which we had to consider very fully in *Fothergill's Case* in which judgment was delivered yesterday by the lord chancellor and ourselves. In that case no doubt it was not necessary for us to lay down what would amount to "payment in cash," since we were clearly of opinion that there had not been any payment of cash or anything that could be called a payment of cash in that particular case, but it was said by the lord chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of checks would not be payment 412] *in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth, it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be a payment in cash within the meaning of this provision. The object of the section was, I apprehend, to prevent such contracts as had been before the court in *Pellatt's Case* ⁽²⁾, and *Elkington's Case* ⁽³⁾, in which a man was to take shares, and to pay for them by supplying goods when wanted. It was considered that there was mischief in collateral contracts of that kind, which deprived creditors of the remedies which they would expect to have against persons whose names they saw registered on the list of shareholders. In *Fothergill's Case* ⁽⁴⁾, the bargain in effect was to give paid up shares in satisfaction of the money which was to be paid for other shares. But if a transaction resulted in this, that there was on the one side a *bona fide* debt payable in money at once for the purchase of property, and on the other side a *bona fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's Case*, and does appear to me now, that this act of parliament did not make it necessary that the formality should

⁽¹⁾ Law Rep., 4 Ch., 475.

⁽²⁾ Law Rep., 2 Ch., 527.

⁽³⁾ Law Rep., 2 Ch., 511.

⁽⁴⁾ Ante, p. 270.

be gone through of the money being handed over and taken back again ; but that if the two demands are set off against each other the shares have been paid for in cash. If it came to this, that there was a debt in money payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient *for this court sitting in a winding-up matter. Of course, [413 one can easily conceive that the thing might have been a mere sham, or evasion, or trick, to get rid of the effect of the act of parliament, but any suggestion of sham, or fraud, or deceit seems to be entirely out of the question in this case, because everybody in the company knew of the transaction ; every shareholder of the company was present, and was a party to the resolution ; there was no deceit practiced on any creditor, nor was there any registration of these shares, except as shares paid up. This seems to me to dispose of the case. It was argued, however, that the payment by the company was made for a consideration which has absolutely failed. If however the payment was made, the subsequent failure of the consideration could not prevent its being a payment, nor prevent its repayment by the shareholders from being a payment in full of the shares, though there might be an action or a bill by the company either for the return of the money or for damages, in case there was a subsequent failure to do something in respect of the property. But I see no trace whatever, no shadow of anything like what may be called a failure of consideration. What the parties were dealing with was a license or sett for a year, with a right to get a license or sett for twenty-one years. That was the property which the parties undertook to deal with. The company, with knowledge of all this, not only paid the £2176, in the manner which appears, to the appellant, but afterwards made arrangements with him for satisfying the two other persons who were interested with him for their proportion of the property. After this disputes arose, not between this gentleman and themselves, but between the intending lessors and themselves ; not as to the right of one to have the lease and the obligation of the other to grant a lease, but as to what would be the proper conveyancing language in which that lease was to be expressed. It appears to me that it would be an abuse of language to say that

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there was anything like a failure of consideration on the part of Mr. Spargo, which is to entitle the company to treat that payment as a payment never made, and to insist that the shares remain unpaid to this day. This applies to the forty-two shares as well as the nine shares. Therefore, it is not necessary to discuss the question as to what we might do under the 101st sec. 414] tion, if this *were a case where Mr. Spargo had not paid up his shares, but they had been so dealt with that as between the company and the present holders they must be treated as paid up. I am of opinion that the order of the vice-warden ought to be discharged with costs of the proceedings in the vice-warden's Court.

SIR G. MELLISH, L.J.: I am of the same opinion. I gave my opinion in *Fothergill's Case* ⁽¹⁾ yesterday, on the proper construction of the 25th section of the act of 1867. I then stated, that in my opinion, if the circumstances relied on would in an action for the money due upon shares be evidence only in support of a plea of accord and satisfaction, this section would prevent their being a good defense; but that if they would support a plea of payment, then the 25th section did not prevent their being a good defense. In the present case, I am of opinion that if an action were brought at law for the amount originally payable on these shares, there would be a valid defense, under a plea of payment. Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

Solicitors: Messrs. Kimber & Lee; Messrs. Gregory, Rowcliffes, & Rawle.

[Law Reports, 8 Chancery Appeals, 415.]

L.JJ. Feb. 22, 1873.

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*In re HOWARTH.

Infant—Maintenance—Freehold Estate.

On an application by an infant for maintenance, the court has jurisdiction, without suit, to charge the expenses of his past maintenance and the costs of the application on the *corpus* of a freehold estate to which he is entitled in fee.

(¹) Ante, p. 270.

THIS was a petition in the Court of Chancery of Lancaster, which, by leave of the vice chancellor, was mentioned to the lords justices. Thomas Howarth, by will dated the 25th of October, 1853, after providing for payment of his debts and giving certain legacies, gave and bequeathed to James Howarth and his heirs two freehold farms upon trust during the term of ten years to apply the rents in manner therein mentioned, and after the expiration of that term upon trust for Reuben Howarth for life, and after his decease upon trust for the eldest son of Reuben Howarth living at Reuben Howarth's decease, his heirs and assigns. The testator died in February, 1857. Reuben Howarth died in 1869, leaving the petitioner, John Thomas Howarth, his only surviving son, who was born in August, 1857. The two farms produced a rent of £50 a year. James Howarth received the rents till August, 1872, when he died insolvent, owing a considerable balance in respect of the rents.

John Thomas Howarth presented his petition "In the matter of J. T. Howarth, an infant," stating the above facts, and that the petitioner had no property except the above two farms; that the petitioner lived with his mother and worked as a weaver, earning about 12s. a week, by means of which and the earnings of his mother as a washerwoman they were maintained; that the petitioner had no duly constituted guardian; that Thomas Howarth was the heir-at-law of James Howarth, but that the petitioner was advised that under the will the legal estate in the farms was vested in himself. The petition prayed that the petitioner's mother or some other proper person might be appointed guardian of his person and estate and receiver of the rents and profits of his estate during his *minority, and that a pro- [416 per allowance might be made for the petitioner's past and future maintenance. It appeared from the evidence that the petitioner was in very delicate health, so that his working as a weaver was highly injurious to him. The vice chancellor on the 27th of November, 1872, referred it to the registrar to approve of a guardian and receiver, and to inquire of what his fortune consisted, and who had maintained him since his father's death, and what would be proper to be allowed for his maintenance and education from any and what time past and for the time to come during his minority, and out of what fund such allowance ought to be made. The registrar on the 28th of January, 1873, certified his approval of guardians and a receiver, and certified that the petitioner's fortune consisted only of the two farms, that the petitioner's mother had maintained the petitioner since his father's death, and that £20 should be allowed her for past maintenance, such sum to be raised out of or charged upon the *corpus* of the petitioner's property, and that it would be proper

that the whole net rents should be allowed for the next two years for the maintenance of the petitioner, after keeping down the interest on any sum which the court should think fit to charge upon or direct to be raised out of the property in respect of the said sum of £20 or the costs of this matter. On the petition coming on again the vice chancellor was of opinion that an order carrying into effect the recommendations of the certificate would be for the infant's benefit, but, doubting his jurisdiction to make it, desired that the matter might be mentioned to the lords justices, expressing his readiness to make the order if their lordships were of opinion that he had jurisdiction (¹).

417] *Mr. J. P. Lake, for the petitioner, referred to *Marlow*

(¹) 1873. Feb. 18. MR. LITTLE, V.C.: This was an application for maintenance by a male infant entitled in fee under the trusts of a will to a real estate producing an income of £50 per annum, and who is nearly sixteen years of age, and in delicate health. The infant possesses no available means except this estate and the future income of it. The proposal laid before me upon foot of the registrar's report was that the costs of the application, and a sum of £30 to be allowed to the infant's mother for past maintenance, should be raised by a mortgage or charge upon the estate, and that, subject thereto, the future income of the estate, after paying the interest on the charge, should be allowed for the infant's future maintenance. I was and am satisfied that it would be proper and beneficial to the infant that this application should be granted, but I doubted the power of the court to make any order binding the *corpus* of the property by the proposed charge, and I further doubted whether, supposing the court would have had power to make such an order in a suit to execute the trusts of the will under which the infant derives title, it could make the order upon a mere petition for maintenance. I have been referred to the cases of *Marlow v. Pitfield* (1 P. Wms., 559), and *Fentiman v. Fentiman* (13 Sim., 171) in support of the application. Those were both decisions in suits to execute the trusts of wills; and, besides that distinction, the several states of facts involved in those cases were very materially different from those in the present case. The case of *Nottley v. Palmer* (11 Jur. (N.S.) 968), was also mentioned, but this case appears to me to have no application. And no precedent has been produced upon which

I can rely in making the order desired; while, on the other hand, the modern cases, and especially *Calvert v. Godfrey* (6 Beav., 87), *Wood v. Pattenon* (10 Beav., 541), and *Field v. Moore* (19 Beav., 176; 7 D.M. & G., 691) are strong authorities to show the absolute want of jurisdiction in the court to bind an infant's real estate by its order, whether the interest be a legal or an equitable one, and however advantageous to the infant may be the object sought to be carried into effect by the order. Now, feeling as I do that the interest of the infant would be best consulted by the order sought for being made, I should be very glad if I could be placed in a position in which I could with propriety make the order. But I cannot merely upon my own authority deviate from what I consider to be the uniform course of the court upon a subject which must very frequently have called for consideration. For it is manifest that cases of infants in want of maintenance succeeding to small real estates or shares of real estates must be of almost every day occurrence, and one would therefore expect to find that if the jurisdiction existed in the court to apply the *corpus* of real estate for maintenance there would be no difficulty in producing any number of precedents of orders to that effect. At the same time, if the infant's advisers are still of opinion that it is within the competency of the court to grant their application, I will very willingly consent that the subject be mentioned to the Court of Appeal, without the expense of an appeal being incurred; and if their lordships shall intimate their opinion to be that the order desired may be made upon this petition, I will at once make it.

v. *Pitfield* ⁽¹⁾; *Jenner v. Morris* ⁽²⁾; *Fentiman v. Fentiman* ⁽³⁾; *Nottley v. Palmer* ⁽⁴⁾; *In re Allen* ⁽⁵⁾.

*SIR W.M. JAMES, L.J.: I am of opinion that there is [418 jurisdiction to make an order for charging the *corpus* of the estate. We can only give an opinion, for the person on whom the estate will descend as heir if the petitioner should die under twenty-one not being before the court, no order can be made by which he will be bound. It is certainly for the benefit of infants who have no means of maintenance besides the rents of freehold estate that the court should have jurisdiction to relieve them from the difficulties incident to that position. I apprehend that here if the mother were to sue the petitioner for necessities supplied to him, a judgment might be obtained by which his inheritance would be bound, and the order asked for substantially comes to the same thing. The cases of *Fentiman v. Fentiman* and *In re Allen* are in point, and following them, I am of opinion that there is jurisdiction to make an order charging the inheritance with the past maintenance and costs.

SIR G. MELLISH, L.J., concurred ⁽⁶⁾.

Solicitor for the petitioner: Mr. *Trevor-Roper, Rochdale*.

⁽¹⁾ 1 P. Wms., 559.

⁽²⁾ 3 D. F. & J., 45.

⁽³⁾ 18 Sim., 171.

⁽⁴⁾ 11 Jur. (N.S.), 968.

⁽⁵⁾ "In the matter of J. T. R. Allen, an infant" (V. C. E. 8 March, 1850; Reg. Lib. 1849, A., f. 760). On petition of the infant and his mother Elizabeth Allen, widow, it was referred to the master to inquire and state "whether it will be fit and proper that any and what sum should be raised by way of charge upon the freehold and leasehold property devised and bequeathed by J. H. Allen, the father of the petitioner J. T. R. Allen, to the petitioner Elizabeth Allen, with remainder to the petitioner J. T. R. Allen, as in the said will mentioned, or either of the said properties, for the purpose of discharging the debt of £150 incurred as in the petition mentioned, for the education of the petitioner J. T. R. Allen, and providing for the education of the petitioner during his minority in such manner as shall qualify him for the profession of a barrister at law, and for the costs of this application and the costs of raising such sum; and if the said master shall find that any sum is fit and proper to be so raised for such purpose, then he is to be at liberty to receive proposals for raising the said sum, and he is to state the same, or such

as he shall approve, with his opinion thereon, to the court, and after the said master shall have made his report such further order shall be made as shall be just."

⁽⁶⁾ See 1 Eng. Rep., 426 note; 3 Eng. Rep., 725, note. G, the guardian of two of his children, maintained and educated them at his own expense, making no charge against them therefor. When he died his estate was ample to pay his debts but in consequence of subsequent losses it became insufficient. His creditors claimed the children should be charged, in the guardianship account, with the expenses of their maintenance and education. Held they were not liable therefor. *Griffith v. Bird*, 22 Gratt., 73.

In general a father is bound to support his infant children, and is not entitled to have the income of their estate appropriated for their support without an order of some proper court, based upon his inability to support them properly. Nor is he entitled to the whole of the income of his child's estate, on the ground that it is necessary to enable him to support and maintain an establishment suitable for such child as a member of his family. Where the executor has paid over the whole income, in such case, to the father, such payment will not be

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confirmed, even if made in good faith. *McKnight's Executors v. Walsh*, 23 N. J. Eq., 137.

It is in the discretion of the court, in view of all the circumstances, whether to allow for past maintenance out of the corpus of an infant's estate not intended by a testator to be so applied. A farmer, by his will, gave to his widow goods and chattels absolutely; also an annuity;

and the use of his homestead and other real estate during her widowhood; she married again and claimed to be paid for the past maintenance of the testator's children from the time of his death, out of the corpus of the estate devised to them at twenty-one and otherwise. The court refused to allow the claim. *Edwards v. Durgen*, 19 Grant, Upper Canada Chy. Rep., 101.

[Law Reports, 8 Chancery Appeals, 419.]

L.C. and L.JJ. Jan. 27, 1873.

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*WEBB v. SADLER.

[1870 W. 154.]

Power of Appointment—Invalid exercise of Power—Extent of Invalidity—Power of Appointment over realty—Conversion—Gift to the executors or Administrators of A.—Persons Designata.

Husband and wife, having, under their marriage settlement, a joint power of appointment over personalty in favor of the children of the marriage, of whom there were three survivors, appointed one-third of the fund to trustees upon such trusts as H (one of the sons) by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of his will, or by will, should appoint; and in default of such appointment, upon trust for H for life, or until bankruptcy or assignment (such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent); and after H's death, upon trust for his executors or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned:

Held, that the appointment to such uses as H should appoint, with consent of the trustees, was void, but that the limitation over in default of appointment by H was valid, and gave H an absolute interest in the share, subject to the contingency of his committing a forfeiture within the prescribed period.

Husband and wife had a joint power of appointment over real estate among the children of the marriage for such estates and interests, and in such manner as they should think fit. In default of and subject to such appointment the estate was to be held, subject to the parents' life interest, in trust for all the children to whom no share had been appointed, to vest in them at twenty-one or marriage. The settlement contained a power of sale and exchange, but no trust for absolute sale.

The husband and wife appointed two-fourths to H and another of their children, the appointment to H being in the same terms as that of the personalty, and declared that the shares of any person interested in the capital arising from any sale under the settlement should be of the quality of personal estate:

Held, that the appointers had power to convert the real into personal estate, and that H took an absolute interest in his share subject to the same contingency as in the case of the personalty.

Order of *Bacon*, V.C., varied.

THIS was an appeal from a decision of Vice-Chancellor Bacon (*). By one of two settlements dated the 13th of November, 1821, executed prior to the marriage of George Stebbings Sadler and *Louisa Firmin, certain personal estate, the property of the intended wife, was settled upon trusts for the benefit of the wife for life for her separate use, with re-

(*) Law Rep., 14 Eq., 588.

mainder to the husband for life, with remainder to the children of the marriage as the husband and wife should jointly, or as the survivor should by deed or will appoint, and in default of appointment for all the children who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, in equal shares, assignable to such children at the respective ages or times aforesaid. This settlement contained no hotchpot clause. By the other of the two settlements certain real estates, the property of the intended husband, were conveyed to trustees and their heirs from and after the determination of the life estates of the husband and wife, to the use of all and every, or such one or more exclusively, of the other or others of the children of the marriage, or the issue of any such child or children, either entirely or in such parts, shares, and proportions, at such age, or respective ages, days, or times, for such estates, rights, and interest, and subject to such powers, provisoes, conditions, and limitations over (such powers, provisoes, conditions, and limitations being for the benefit of all and every, or some one or more of the said children or grandchildren), and in such manner as the husband and wife during their joint lives, or the husband after the death of his wife, should appoint, and in default of appointment in trust for all and every such child and children of the marriage to whom or for whose benefit no part or share of or in the said premises should have been appointed as aforesaid, in equal shares as tenants in common, to vest at twenty-one or marriage. The settlement contained the usual powers of sale and exchange with trusts for the reinvestment of the proceeds in land to be settled to the same uses; but there were no trusts for absolute sale. On the same day G. S. Sadler executed a bond, conditioned to be void on payment by his heirs, executors, or administrators, within one year after his decease, to the trustees of the said settlement of £2000, to be applied by them according to the trusts of that settlement.

There were issue of the marriage four children: George Thomas, Harcourt, Clara Sophia, and Henry Robert Sadler.

*Harcourt Sadler attained twenty-one, and died on the [421 5th of April, 1852, intestate, leaving his father, G. S. Sadler, his heir-at-law. On the 1st of May, 1852, G. S. Sadler and his wife appointed one-third of the funds contained in the first settlement, subject to their own life estates, to George Thomas Sadler absolutely; and on the 1st of June, 1856, they appointed, in like manner, another third part of the same funds for the benefit of Clara Sophia Sadler, who shortly afterwards married John Weir, when her share was settled. By a deed poll dated the 19th of December, 1859, G. S. Sadler and Louisa his wife ap-

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pointed the remaining one-third of the personalty after their own deaths to trustees upon trust to raise £1500 and interest upon certain trusts, and to stand possessed of the residue upon such trusts as Henry Robert Sadler at any time should by deed to be duly executed by him, but nevertheless with the consent in writing of the said G. S. Sadler, during his life, and after his decease with the like consent of the persons or person who for the time being should be the acting trustees or trustee under any last will and testament of G. S. Sadler, and whether therein named, or to be appointed under any power therein, or by the Court of Chancery or other competent authority, and which consent, either by the said G. S. Sadler or by the other person or persons thereinbefore referred to in that behalf, should be testified by his or their signature of the deed or deeds by which any such appointment or appointments should be made, or as the said H. R. Sadler, if his life interest under the next succeeding trust should not have determined during his life under or by virtue of the provisions in that behalf thereafter contained, but not otherwise, should by his will, or any codicil thereto, limit or appoint; and in default of and subject to any such limitation or appointment, then in trust to pay the income to H. R. Sadler during his life, or until his interest under the present trusts should sooner determine under and by virtue of the provision thereafter contained; and from and after his decease (if and provided that his interest under the last preceding trust should not have determined under and by virtue of the provision in that behalf therein contained), then subject as aforesaid, and in default of any limitation or appointment, 422] upon trust for his executors or administrators as *part of his personal estate; but if such interest should have determined, then subject as aforesaid, and in default of any such limitation or appointment, upon the like trusts as would have affected the residue of the same third share, if the same had been duly appointed in favor of H. R. Sadler only during his life, or until the period of such determination: Provided always that if H. R. Sadler, at any time during the lives or life of G. S. Sadler and Louisa his wife, or the survivor of them, or during the period of twenty-one years next after the decease of such survivor, should be declared bankrupt, or take the benefit of any Insolvent Debtors Act, or assign, alien, charge, or in any manner encumber or affect the income thereinbefore directed to be paid to him after the decease of G. S. Sadler and Louisa his wife, the trust thereinbefore declared for his benefit during his life should absolutely cease, and thenceforth during his life the same income should be held in trust for and paid to the persons to whom the same would be payable if H. R. Sadler were then dead. By

another deed-poll dated the same 19th of December, 1859, G. S. Sadler and Louisa his wife appointed two-fourths of the real estate comprised in the second indenture of settlement, subject to their own life interest, in favor of Mrs. Weir and H. R. Sadler respectively. The trusts in favor of H. R. Sadler were the same as those in the last mentioned deed of appointment; and after his death, and in default of and subject to appointment by him, or such determination of his estate by bankruptcy or alienation, the trust was declared to be for his executors or administrators as part of his personal estate. And it was thereby declared that the shares and interests of the persons beneficially interested in the capital or principal moneys arising from any sale under the powers contained in the same indenture of settlement should be of the quality of personal and not real estate, and that the same moneys should not be invested in the purchase of real estate.

On the 14th of January, 1866, George Thomas Sadler died intestate, leaving a widow and several children, sons and daughters, two of whom had attained twenty-one. In the course of the year 1866, at the request of G. S. Sadler and his wife, the real estates were sold under the powers of sale contained in the second settlement. *G. S. Sadler died in 1869, and his [423 wife died in 1870.

The bill was filed for the purpose of ascertaining the rights of the parties interested under the two indentures of settlement, and amongst the questions in dispute were the following: First, whether the powers given by the deeds of the 19th of December, 1859, to H. R. Sadler, to appoint by deed, with the consents therein mentioned, or by will, if he should not previously have committed a forfeiture, were valid; and whether, if such powers were invalid, the limitations in default of appointment failed also; and secondly, whether the declaration in the second deed of appointment of the 19th of December, 1859, that the proceeds of the real estate should be of the quality of personal estate was binding as against the heir-at-law of Harcourt Sadler. The vice chancellor held, first, that the whole of the appointments in favor of H. R. Sadler contained in the deeds poll were invalid, except to the extent of giving him an estate for life, or until bankruptcy or assignment; and that his share, subject to his life interest, went to the persons entitled in default of appointment; and secondly, that the real estate was converted into personalty by the second deed poll. From this decision, except so far as it related to the conversion of the real estate into personalty, H. R. Sadler appealed.

Mr. *Morgan*, Q.C., and Mr. *G. O. Edwards*, for the appellant: We admit that the clause requiring the consent of the trustees

is invalid, both as being an attempt to import a stranger into the power, and as a violation of the rule against perpetuities. But this clause may be rejected and the power of appointment given to H. R. Sadler maintained. It is only added as a proviso, and it makes no difference that it precedes the gift of the power instead of following it: *Alexander v. Alexander* ⁽¹⁾; *Fry v. Capper* ⁽²⁾; *Churchill v. Churchill* ⁽³⁾; *Busby v. Salter* ⁽⁴⁾; *Sugden on Powers* ⁽⁵⁾. But if this power should be held altogether invalid, the subse- 424] quent limitations in default of appointment are valid: **Ingram v. Ingram* ⁽⁶⁾. The late case of *Carr v. Atkinson* ⁽⁷⁾ is exactly in point. The effect of those limitations is, that H. R. Sadler takes an absolute interest, subject to the contingency of his forfeiting his life estate within twenty-one years after the death of his surviving parent; for a gift of personal estate to a man for life, and after his death to his executors and administrators, gives him the absolute interest, even though there is an intermediate power to dispose of it by will: *Bray v. Bree* ⁽⁸⁾. In the present case the construction is made still clearer by the additional words "as part of his personal estate." The vice chancellor was in declaring that the whole of the real estate was converted into personalty by the declaration contained in the second deed poll. It has been long settled that a power to appoint real estate among a class is well exercised by an appointment to trustees upon trust to sell and divide the proceeds: *Kenworthy v. Bate* ⁽⁹⁾. That is the effect of the declaration in the present case.

LORD SELBORNE, L.C.: We are clearly of opinion that the powers of appointment given to H. R. Sadler with the consent of the trustees are altogether void.

Mr. Amphlett, Q.C., and Mr. Crossley, for the plaintiffs: We contend that both real and personal estate went, as in default of appointment; and that the real estate was converted into personalty. The power of appointment given to H. R. Sadler being void, the limitations in default of appointment were void also. Those limitations were only intended to take effect if the power of appointment took effect. *Ingram v. Ingram* was a case in which the void power was to appoint to objects of the original power, so that it was the intention of the donee of the original power that those objects should take at all events. And we refer to the observations of Lord St. Leonards on that case in his work on Powers ⁽¹⁰⁾. But the ultimate limitation is void for another reason. It is a gift to H. R. Sadler for life, and after his

(1) 2 Ves. Sen., 640.

(2) Kay, 163.

(3) Law Rep., 5 Eq., 44.

(4) Preston on Abstracts, vol. ii., p. 164.

(5) 8th Ed., 668.

(6) 2 Atk., 88.

(7) Law Rep., 14 Eq., 307.

(8) 2 Cl. & F., 453.

(9) 6 Ves., 793.

(10) 8th Ed., p. 515.

death, in certain events, *to his executors and adminis- [425
trators. They would take as *personæ designatæ*, and would hold
the property as trustees of the will; or the expression may be
construed to mean next of kin. In either case H. R. Sadler
would have no power of dealing with the property during his
life: *Wilson v. Mount* (1); and the gift is therefore void for re-
moteness. This is made clearer by the manner in which the
real estate is given in the second deed poll. There the ultimate
gift is also to the executors and administrators, where they
must certainly take as *personæ designatæ*.

Mr. Kay, Q.C., and Mr. Warmington, for the eldest son of G.
T. Sadler, who was heir-at-law of Harcourt Sadler: On the first
point, we agree with the contention of the plaintiffs, that the
limitations over are void. The remainders will not be accele-
rated by the failure of a prior gift: *Alexander v. Alexander* (2).
On the second point, we say that the realty was not converted
into personalty. The appointors could not alter the nature of
the property. At all events they could not, while dealing with
only a part, direct the whole to be converted. There was no
trust for sale, and the share of Harcourt Sadler had already
vested in him as real estate; and a subsequent declaration by
appointors would not affect the rights of his heir-at-law. The
fact of an actual sale under the power having taken place can
make no difference: *Earlom v. Saunders* (3).

Mr. H. Humphreys, for the widow of G. T. Sadler, contended
that the question of conversion was not open upon the present
appeal.

Mr. Eldis, Q.C., and Mr. Kingdon, for the trustees of Mrs.
Weir's settlement.

Mr. Haynes, for the executors of G. S. Sadler.

Mr. G. Murray, for the surviving trustee of G. T. Sadler's
settlement.

Mr. W. King, for the trustees of the original settlement.

*LORD SELBORNE, L.C.: The first point in this case is one [426
of construction. There is no bias in the mind of the court upon
a question of construction. The sole object is to find out the
meaning of the words which are used, and when that is done
the legal effect has to be ascertained. Here, it appears to us
quite clear that no power of appointment whatever is given to
Henry Robert Sadler by the first clause of the first deed poll
and the corresponding clause in the other instrument, excepting
the power to be exercised, with the consent in writing, after the
death of the parents, of the acting trustees or trustee, who were
persons to whom no such authority could be delegated, inde-
pendently of any question of remoteness. If, therefore, that is
an inseparable condition of the exercise of the power, the power

(1) 2 S. & S., 498.

(2) 2 Ves. Sen., 640.

(3) Amb., 241.

altogether fails. We all think it is an inseparable condition of the exercise of the power. There is no analogy between the effect of such a clause and the cases where there is a separate and superadded condition after the gift of an estate. Here there is no power except with consent.

Then the next question is, whether the subsequent appointments, "in default of and subject to any such limitation or appointment" containing dispositions in favor of the son, are so connected with the void power, that the void power failing they fail also. It seems to me that such a construction would be expressly contrary to the declared intention. The declared intention is, that unless estates that would displace this gift to the son are created in favor of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created, and the event never could arise which alone was meant to prevent the gift in favor of the son taking effect. The words "and subject to" confirm this view. If it had been intended to create a charge, and the gift made to the son were "subject to the charge," then, if the charge did not arise, the son would have taken it free from that charge.

Then arises the third question, on which we agree with the appellant. That question does not seem to us, judging from the language of the vice chancellor, to have been so fully presented to His honor in argument as it has been to us. We have here a gift for life to H. R. Sadler, followed by an absolute gift after 427] death, *the two gifts being separated from each other, for this reason only, that legal conditions of forfeiture are annexed to the estate during his life, and that interest is not to be absolute if forfeiture of the life estate takes place under those conditions. That being the scheme and purpose of the deed, it naturally follows that its framers separate, in point of expression, the life interest from the absolute reversionary estate, because they go on to say that if he alienates the income during his life or becomes bankrupt that interest is to be forfeited, and if so, the particular power given over the whole is to cease, and the interest given absolutely in the reversion is only to arise if and provided no such forfeiture should have taken place. But if that event is limited within such a period of time as the law allows and has not happened, then, as it seems to us, there is a plain declaration of intention that the *corpus* is to be part of his personal estate. He has the whole life interest, and the whole *corpus* after that life interest is to be part of his personal estate. In my judgment you cannot make, in a man's lifetime, a reversion part of his personal estate *simpliciter* without giving him absolute power of alienation over it. All persons who take beneficially take simply through him. If as creditors, it is because they

have rights by law against the personal estate, and this was part of the personal estate; and if as legatees, not because there is a gift to the legatees here, but for a similar reason, namely, because he can dispose of his personal estate by will, and they take it only as part of his personal estate. So with respect to every other mode of alienation. In my judgment such a gift is exactly the same thing as if the testator had said, "In trust for the said Henry Robert Sadler, his executors and administrators, as part of his personal estate."

There was a case much less clear than this before the master of the rolls, *Long v. Watkinson* ⁽¹⁾, where a brother had made a will in favor of his sister, contemplating, on the face of the will, the possibility of the event, which happened, of her dying in his lifetime. The brother gave his personal estate to her absolutely; but if she died in his lifetime, then he said, "My instructions are then to pay over all the residue and remainder of my estate and effects to the executors or executrixes which my said sister may appoint," *but not adding, as here, as part of her personal estate. It was held even there, that the administration must be exactly on the same principle as if it were part of the personal estate in her lifetime, and the master of the rolls expressly said this ⁽²⁾: "In my opinion the contest, whether the residuary legatee or the next of kin take the property, is in many cases a contest arising from a misapprehension of the character in which the executor or executrix takes the property. The executor or executrix who takes the property does so as a trustee, and the person who takes the property beneficially takes it as a *cestui que trust*, and not as a *personæ designatæ*. It is, in my opinion, inaccurate to lay down as a rule that in such cases the fund belongs either to the residuary legatee or to the next of kin. It belongs to the persons who are interested in the estate of the person to whose executor it is given." While the donee is alive, who is interested in the property except himself? Everybody taking it after his death can only take it through him or in his right, and such an estate is necessarily alienable in his lifetime; and in the present case, the appointment being within due limits as to time, in my judgment it is well made.

With regard to the real estate, it appears to me that it was competent, as I read the terms of the power, to modify the estate or interest in the realty given to the objects of the power by appointing it in any reasonable or convenient manner that could be considered to be for their benefit. Among other modes of modification, I am of opinion it was competent to the donee of the power to say it should be converted and held as personalty. And I also think that it was equally competent to do this as to an individual share, as with respect to the whole. As to the

⁽¹⁾ 17 Beav., 471.

⁽²⁾ 17 Beav., 474.

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share, the appointors have said so in the plainest words, by directing that the real estate, which, for argument's sake, I will suppose continued in specie down to the time of the death of the tenant for life, is to go after his death to the executors as part of his personal estate. Nothing is more familiar to this court than real estate by virtue of a trust impressed upon it being enjoyed as personalty, and *vice versa*, personal estate being enjoyed as realty. There is a clear intention that these shares of the real estate should go in that manner as personalty, and be administered by the executors in the same way. In my judgment it is wholly unnecessary, and therefore improper *to go into any ulterior question as to the effect of the exercise of the power of sale upon the other shares of the property. The only question for our decision is as between the appellant and the respondents; and in favor of the appellant, I hold that there is a good conversion in equity by the terms of the deed of appointment. The order of the vice chancellor will be altered, and a declaration made that from and after twenty-one years from the death of the survivor of G. S. Sadler and his wife, and provided that H. R. Sadler during that time does not become bankrupt or alienate his life interest, H. R. Sadler is absolutely entitled to his share of the personalty; and a similar declaration as to his share of the proceeds of the realty.

SIR W. M. JAMES, L.J.: I am of the same opinion. For some time there was an opinion entertained by the courts that the words "executors and administrators" following a gift for life were to be considered next of kin, or that the executors were to take beneficially as *personæ designatæ*. That was acted on in *Palin v. Hills* (1) before Lord Brougham, where he reversed a decision of the master of the rolls; but for many years there has been no question that "executors and administrators" mean executors and administrators, and nothing else. In this settlement the additional words, "as part of the personal estate," have been inserted for the very purpose (the instrument evidently being prepared by some gentleman acquainted with the law) of excluding any question whatever as to anybody being entitled but the personal representative; and a gift to A for life, and after his death to his legal personal representative, is a valid absolute gift to A.

SIR G. MELLISH, L.J.: I am of the same opinion.

Solicitor for the plaintiffs: Mr. Joseph Beaumont.

Solicitors for the other parties: Messrs. Johnson & Weatheralls; Messrs. Bridges, Sawtell & Co.; Mr. Mark Shephard; Mr. Hemslcy; and Mr. A. C. Edwards.

(1) 1 My. & K., 170.

[Law Reports, 8 Chancery Appeals, 430.]

L.C. and L.JJ. Jan. 18, 21, 30, 1873.

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[1870 H. 190.]

Voluntary Settlement — Power of Revocation — Change of Mind — Destruction of Deed — Variation from Instructions.

The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid; they are merely circumstances to be considered in deciding on the validity of a voluntary settlement.

A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death, for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to contain a power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the consent of a son who was both beneficially interested and a trustee of the settlement, and made a will purporting to dispose of the whole property:

Held (reversing the decree of *Wickens*, V. C.), that, under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions.

ELIZA HALL was, at the time when she made the settlement hereinafter mentioned, a widow, residing at Shipley, in Yorkshire, and about fifty years of age. She had then seven children, and she had several freehold houses and buildings situate at Shipley. In the year 1852 she went to a solicitor, Mr. Humble of Bradford, and informed him of her wish to make a settlement of her property on herself and some of her children and grandchildren, giving as a reason that she did not wish all her property to go to her eldest son. She expressed a great aversion to making a will. Mr. Humble took down instructions accordingly, and then prepared and engrossed the deed of settlement hereinafter mentioned. The deed varied from the instructions in some particulars, as mentioned in the judgment of the Lord Justice James.

The deed was dated the 24th of December, 1852, and was expressed to be made between Eliza Hall of the one part, and Lewis Hall and George Alderson of the other part, and thereby, after reciting that the said Eliza Hall was desirous of settling and *assuring the hereditaments thereafter described and [431] intended to be thereby conveyed in the manner thereafter mentioned, it was witnessed that for effectuating such desire, and for the nominal consideration therein mentioned, she, the said Eliza Hall, did thereby grant and convey unto the said Lewis Hall and George Alderson and their heirs, certain messuages and buildings at Shipley with their appurtenances, To

(¹) Reversing 3 Eng. Rep., 783.

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have and to hold the said messuages and buildings and the hereditaments thereby conveyed with the appurtenances unto the said Lewis Hall and George Alderson, their heirs and assigns, upon trust to pay the rents and profits of the said hereditaments, when and as the same should become due and be received, unto the proper hands of the said Eliza Hall, or otherwise to permit her to receive the same for and during the term of her life, for her sole and separate use, independently of the control of any future husband, and so as not to be subject to his debts, control, or engagements. And from and after the decease of the said Eliza Hall upon trust to receive the said rents and profits and to pay the same to Sophia Hall, Jesse Hall, and Ellis Hall, three of the children of the said Eliza Hall, or to apply the same for or towards their maintenance and education during their respective minorities, and when the youngest should attain the age of twenty-one years (the said Eliza Hall being then dead) upon trust to sell and dispose of the said hereditaments, either by public auction or private contract, for the best price that could be obtained for the same, and to enter into and make and execute all such contracts and conveyances as might be necessary to carry the said sale into effect. And then upon trust, in the first place, to deduct and retain the costs and expenses of the sale; and in the next place, to pay and divide the residue or surplus unto and amongst John Hall, the said Lewis Hall, and Edwin Hall, Ruth Hall, and the said Sophia Hall, Jesse Hall, and Ellis Hall, the sons and daughters of the said Eliza Hall, their executors and administrators, in equal shares and proportions as tenants in common: provided, nevertheless, that in case the said John Hall, Lewis Hall, Edwin Hall, Ruth Hall, Sophia Hall, Jesse Hall, and Ellis Hall, or any of them, should depart this life in the lifetime of the said Eliza Hall, or after her death any of them the said Sophia Hall, Jesse Hall, and *Ellis Hall should die under the age of twenty-one years without leaving lawful issue, upon trust to pay and divide the shares or respective shares of them, her, or him so dying unto and equally amongst the survivor and survivors of them the said John Hall, Lewis Hall, Edwin Hall, Ruth Hall, Sophia Hall, Jesse Hall, and Ellis Hall, who should be then living, and the lawful issue of such of them as should be then dead, such issue taking his or her parent's share only. And in the deed was contained a covenant for further assurance on the part of the said Eliza Hall, and the usual trustees' receipt and indemnity clauses, and also a power of appointing new trustees vested in the trustees or trustee for the time being.

Mrs. Hall and her brother John Beanland came on the 24th of December, 1852, to the office of Mr. Humble, when the deed

was read over to her, and she executed it. There was some conflict of evidence between Mr. Humble and Mr. Beauland as to what took place on that occasion, and as to whether he told her that the deed would be irrevocable. The effect of the evidence is stated in the judgment of the Lord Justice James. Mr. Humble did not suggest to her, and it never occurred to him to suggest, that the deed ought to contain a power of revocation. Mr. Humble registered the deed at the Wakefield Registry on the 1st of January, 1853, and then sent or gave it to Mrs. Hall. She kept it until the year 1855, when she gave it to Lewis Hall, one of her sons, and one of the trustees of the deed; he kept it for some months, and then, as some of the other children disapproved of his keeping it, he returned it to Mrs. Hall. In 1859 Mrs. Hall instructed Mr. Humble to make a will for her by which she purported to dispose of the property comprised in the deed of settlement. Mr. Humble prepared a will accordingly, which she executed, but which was revoked by her subsequent will. In the year 1860 or the year 1861, she burnt the deed. The evidence as to the circumstances under which she burnt the deed was conflicting; there was also conflicting evidence as to her expressions at that time and at other times; some of the witnesses stating that she thought she had put an end to the trusts of the deed, and expressed her satisfaction at having done so; others stating that she knew she could not do so.

*By an indenture dated the 24th of October, 1861, Mrs. [433 Hall conveyed part of the hereditaments comprised in the deed of settlement to Eliza Matilda Matthews, by way of mortgage for securing the repayment of £200 and interest. The deed of settlement was not referred to in the indenture of mortgage; but according to the statement of Lewis Hall, she asked his consent to the mortgage, and he, being ignorant of his duties under the deed of settlement, gave his consent, but he was not a party to the indenture of mortgage. In 1866, Mrs. Hall made another will, also prepared by Mr. Humble, in which she purported to devise specifically to her different children the different houses and buildings comprised in the deed of settlement, and made other devises and bequests. She died in June, 1866, and for some time afterwards her property was treated as having passed under her will. In 1870, however, Lewis Hall filed a bill against the other persons interested, and against the other trustee, stating that he had been unable to find the deed of settlement, but that he had recently discovered that Mr. Humble had prepared the deed, and had a draft thereof in his possession; and the bill prayed for execution of the trusts of the deed. In 1871 some of the grandchildren of Mrs. Hall, suing by their next

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friend, filed a cross-bill (*Hall v. Hall* [1871 R. 20]) to have the deed of settlement set aside and the will of 1866 established. The Vice-Chancellor Wickens made a decree in both suits, setting aside the deed of settlement; as reported (1). Lewis Hall, the trustee of the deed, appealed. The appeal came on to be heard on the 13th of January. When the case for the appellant had been partly opened, their lordships expressed their wish to examine Mr. Humble and Mr. Beanland *visà voce*, and the hearing was adjourned for their attendance. They accordingly attended on the 21st of January, and were examined. The effect of their evidence is stated in the judgment of the Lord Justice James. The argument of the appeal was then proceeded with.

Mr. Greene, Q.C., and Mr. Morshead, for the appellant: There 434] can be no doubt that Mrs. Hall wished to make an *irrevocable settlement of this property, whether the law was explained to her or not. [THE LORD JUSTICE JAMES: A voluntary deed of gift of real estate is always to a certain extent revocable, inasmuch as the land can be sold for valuable consideration.] The absence of a power of revocation is not fatal to a voluntary deed; it is only a circumstance to be taken into consideration as part of the evidence on which the deed is impeached. *Mountford v. Keene* (2) was a case of purchase for valuable consideration. *Nanney v. Williams* (3), *Forshaw v. Welsby* (4), and *Toker v. Toker* (5), show what the law is. *Coutts v. Acworth* (6) was a strong case, and was disapproved of in *Phillips v. Mullings* (7). In *Everitt v. Everitt* (8) the deed was improvident. Here Mrs. Hall knew perfectly well what she was about; and there is no suggestion that she was under the influence of any one else. As to her imagining that the deed was revocable, that is contrary to the notion entertained by persons ignorant of law. The variations from the instructions are unimportant, and not greater than occur in most cases. Moreover, the deed is not impeached on that ground. A deed is not to be lightly set aside without special reasons, none of which are found here. *Clavering v. Clavering* (9), *Boughton v. Boughton* (10), and *Bolton v. Bolton* (11), show what the law of this court is.

Mr. Millar, Q.C., and Mr. V. Hawkins, for the principal respondents: It is clear that Mrs. Hall was never told that she could have a revocable settlement. She had an objection to making a will, and a revocable deed was what she wanted. It is clear from her acts that she never considered the deed to be

(1) Law Rep., 14 Eq., 365.

(2) 19 W. R., 708; 3 Dav. Prac.
"Settlements," 823, n.

(3) 22 Beav., 452.

(4) 80 Ibid., 243.

(5) 81 Ibid., 629; 3 D. J. & S. 487.

(6) Law Rep., 8 Eq., 558.

(7) Law Rep., 7 Ch. 244, 247.

(8) Ibid., 10 Eq., 405.

(9) 2 Vern., 473.

(10) 1 Atk., 625.

(11) 8 Sw., 414, n.

irrevocable. If the deed had been sent to a conveyancer to prepare, he would have added a power of revocation, or have called the attention of the settlor to the point, and Mr. Humble ought to have done the same. *Naldred v. Gilham* ⁽¹⁾ is almost exactly the same case. *Mountford v. Keene* has always been acquiesced in. In *Phillips v. Mullings* a *revocable deed would not [435 have answered the purpose. In *Everitt v. Everitt* ⁽²⁾ an irrevocable deed was set aside. The whole doctrine of the court on the subject is laid down in *Huguenin v. Baseley* ⁽³⁾, and there the intention to have an irrevocable deed was much more clearly proved. It is true that the solicitor was not concerned for the donees, but that can make no difference. The same solicitor is usually employed for both: *Phillipson v. Kerry* ⁽⁴⁾. The court must be satisfied that the solicitor did all that he ought to have done: *Cooke v. Lamotte* ⁽⁵⁾.

Mr. Lindley, Q.C., Mr. Bagshawe, Mr. Stallard, and Mr. F. A. Lewin, for other parties.

Mr. Greene, in reply, cited *Bill v. Cureton* ⁽⁶⁾ and *Petre v. Espinasse* ⁽⁷⁾.

Jan. 30. SIR W. M. JAMES, L.J.: The original bill in these causes was a bill for the execution of the trusts of a voluntary settlement of freehold property, executed by a widow lady of mature age, being fifty years old or thereabouts. By the settlement she reserved to herself a life interest, directed the rents to be applied after her death for the maintenance for her minor children until they should all attain the age of twenty-one, and directed that the property should be then sold and the proceeds divided among her seven children and their issue. The cross bill prayed that the settlement might be declared void in equity and be set aside. The vice chancellor made a decree in accordance with the prayer of the cross bill, but it clearly appears from the judgment that the appellant's counsel is well warranted in saying that although in form he is appealing from the vice chancellor's decree, he has in his favor the opinion of that learned judge, who felt himself constrained by the result of the authorities, although he did not think it quite easy to recognize as sound the conclusion which he drew from them. *It is neces- [436 sary, therefore, to inquire whether there is any such binding authority or any sound principle on which that conclusion can be based. Many cases have been referred to. One of the earliest, if not the earliest, in which the absence of a power of revocation was relied on was the case of *Naldred v. Gilham* ⁽¹⁾. In

⁽¹⁾ 1 P. Wms., 577.

⁽²⁾ Law Rep., 10 Eq., 405.

⁽³⁾ 14 Ves., 273.

⁽⁴⁾ 32 Beav., 623.

⁽⁵⁾ 15 Beav., 234, 247.

⁽⁶⁾ 2 My. & K., 503.

⁽⁷⁾ Ibid., 496.

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that case the master of the rolls had, "with great clearness," decreed in favor of the settlement; and although that decree was reversed by Lord Macclesfield, it is plain, from his judgment, not only that he did not mean to lay down any such general rule as that contended for in the present case, but that he had no idea that such a rule existed. It is said to have been laid down in *Huguenin v. Baseley* ⁽¹⁾ that the absence of a power of revocation was strong evidence that the party did not understand the transaction: [His lordship then read from Lord Eldon's judgment.] If, however, it had been considered by the distinguished counsel and the eminent judge in that case that the matter could have been disposed of easily and summarily on the mere ground that there was an omission of a power of revocation not satisfactorily accounted for, the vivid eloquence of the advocate (the charm of whose argument was represented by Lord Cottenham many years afterwards as still fresh in his recollection) and the elaborate and exhaustive judgment of the judge which has made that case one of the most celebrated and valuable in our reports, would have been a superfluous, if not an idle display of intellectual power — a mere forensic and judicial exercise.

To come down to the more modern cases. In *Nanney v. Williams* ⁽²⁾ there was the conclusive circumstance that the settlor actually struck out the word "irrevocably," and that the deed as it was executed contained a recital that the testator was desirous of "revocably" settling the property. In that case, moreover, the solicitor who prepared the deed took a life interest in remainder, with remainder to his children in tail. But even in that case the learned judge did not consider himself warranted in declaring the deed void, without a very careful and elaborate examination of all the surrounding facts and circumstances, the [437] subsequent*conduct and proceedings of the settlor, and the evidence of the solicitor, from which he considered it proved that the deed omitted that power of revocation, in the event of his changing his mind, which the settlor always intended to reserve. In *Forshaw v. Welsby* ⁽³⁾, before the same learned judge, where the deed was set aside at the instance of the settlor himself, the court came to the conclusion, on all the facts and circumstances, that the deed was in truth in the nature of a *donatio mortis causa*. But there is one case, and one only, *Mountford v. Keene*, before the master of the rolls, in which (as reported), the broad proposition relied on in this case appears to have been laid down. [His lordship read the material portions of the judgment as reported ⁽⁴⁾]. It is not probable that

⁽¹⁾ 14 Ves., 273, 297, 298.

⁽²⁾ 22 Beav., 452.

⁽³⁾ 30 Beav., 248.

⁽⁴⁾ 19 W. R., 908.

the master of the rolls intended to lay down that which he is here reported to have said, wholly irrespective of the consideration that there was "a set of relatives quarrelling over the poor, enfeebled, semi-paralytic old man," and of the other circumstances in that case, which might have well warranted the conclusion that it was not the deliberate act of a person understanding sufficiently the nature of what he was doing. At all events, the master of the rolls could not have intended to overrule his own very elaborate judgment in *Toker v. Toker* ⁽¹⁾, affirmed as that decision was by the Court of Appeal ⁽²⁾. It will be observed that that case is almost indetical with the present case; the only distinction being, that it was the case of an aunt and one nephew, instead of the case of a mother and her children. In that case the judge did what we have done in this case; he caused the solicitor to be examined *virâ voce*, and with very much the same result. It appears, therefore, from the examination of the authorities, that there is no such established rule as that to which the vice-chancellor conceived himself constrained to yield. Is there, then, any foundation in principle for such a rule? The law of this land permits any one to dispose of his property gratuitously, if he pleases, subject only to the special provisions as to subsequent purchasers and as to creditors. The law of this land permits any one to select his own attorney to advise him; and it *seems [438 very difficult to understand how this court could acquire jurisdiction to prescribe any rule that a voluntary conveyance executed by a person of sound and disposing mind, free from any fraud or undue influence of any kind, and with sufficient knowledge of its purport and effect, should be void because the attorney of his own selection did not advise him to insert a power of revocation, or did not take his express direction as to the insertion or omission of such a power. It might, with as much reason, have prescribed that such a deed should be executed and so attested as is required for a will, or that, like a married woman's deed, it should be acknowledged before a judge or commissioner. The true rule is that which was laid down by Lord Justice Turner in *Toker v. Toker* ⁽³⁾; that the absence of a power of revocation is a circumstance to be taken into account, and is of more or less weight according to the other circumstances of each case. In this case, dealing with that absence accordingly, are there any facts to show that the settlement is other than the free, determined act of the settlor? There is some conflict of evidence between Mr. Beanland, the brother of the lady, and the solicitor, who is in the unfortunate

⁽¹⁾ 31 Beav., 629.⁽²⁾ 8 D. J. & S., 487.⁽³⁾ 8 D. J., & S., 487, 491.

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position of being solicitor and witness in a suit to avoid a deed prepared by himself: [His lordship then stated and commented on the evidence.] On the evidence it is quite clear that the lady understood what she was doing, and that it was a final, irrevocable settlement of her property. The settlement in itself is very reasonable and just. It is impossible to say that there is anything more improvident in a mother giving her children an assured provision after her death than there is in a husband making a similar provision for his wife and children, or a donee of a power making an irrevocable appointment. There are the facts that the deed was registered; that the deed was actually delivered to the son, one of the trustees; and that, although it was re-delivered to the mother, it was so only because the other children, for some reason, preferred it being in her custody; and when the lady afterwards mortgaged the property, she asked the permission of her son, the trustee, to do so.

439] *In the face of these facts, the subsequent conduct of the lady, even if admissible to make evidence for herself against her own deed, that is to say, her burning the deed, her mortgaging the property, her satisfaction that she had got rid of the old deed, and her making a will, are of no weight or value. They prove change of mind, but do not prove that at the time of the execution of the deed her mind was other than therein expressed.

In the course of the case it appeared that the deed differed in two material respects from the instructions given to the solicitor, or rather from the notes which he took down of the conversation for his own guidance. The lady, it is obvious, could not have dictated such instructions, but must have simply answered his questions or assented to his suggestions as to the details. Amongst those notes and instructions there is this: "The rents to be divided amongst (which would, *prima facie*, appear to mean equally amongst) the children." In the deed they are to be in effect paid to the minors, or sole minor, during minority. Another note is: "Power of sale to trustees with lady's consent." No such power of sale is inserted in the deed. The solicitor, however, deposes that the provision as to the minors was expressly approved of by the lady. He might well have thought that the intention was that the trustees were not to sell during her lifetime without her consent, and that as they could not under the deed sell at all during her lifetime, that object was sufficiently effected. Under the circumstances, and having regard to the fact that no case is made in this respect by the cross-bill, it is not material to inquire what would have been the effect of such an apparent departure from the donor's inten-

tions if unexplained. The conclusion, then, is, that there is no ground established for setting aside this deed, and that the cross-bill ought to be dismissed — and dismissed with costs. There must be, of course, in the original cause, the ordinary decree for the execution of the trusts of the settlement, and for the sale of the property and division of the proceeds accordingly. [His lordship then directed what accounts were to be taken and inquiries made, and gave directions as to the election to be made by children who took interests under the deed and other interests under the *will. And he decided against the claim of [440 one of the defendants, who had bought part of the land from devisees under the will.]

LORD SELBORNE, L.C. : I agree in the judgment just delivered. During the argument I was very much struck by the departure of the deed, in two not immaterial points, from the instructions of the settlor ; and if the deed had been impeached on that ground, and if the transaction had been recent, I might probably have required more evidence than that before us to satisfy me that the deed could stand. But the bill does not allege that in either of those respects the deed was not in accordance with the real intention of the settlor, and the transaction is now twenty years old. Under these circumstances, I concur in the view, on this part of the case, which the lord justice has taken. On the rest of the case I never felt any doubt. The absence of a power of revocation in a voluntary deed, not impeached on the ground of any undue influence, is, of course, material when it appears that the settlor did not intend to make an irrevocable settlement, or when the settlement itself is of such a nature, or was made under such circumstances, as to be unreasonable and improvident unless guarded by a power of revocation. I do not, however, see on what principle the absence of such a power can be considered material in a case like the present, from which both these elements are absent.

SIR G. MELLISH, L.J., concurred.

Solicitor for Lewis Hall : Mr. *M. K. Braund*, for Mr. *J. Green, Bradford*.

Solicitors for the plaintiff in the cross suit : Messrs. *Duncan & Murton*, for Mr. *G. Humble, Bradford*.

Solicitors for other parties : Messrs. *Paterson, Snow, & Burney*, for Messrs. *Busfield & Atkinson, Bradford*.

[Law Reports, 8 Chancery Appeals, 441.]

L.JJ. Dec. 20, 1872.

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*LACEY v. HILL. [1870 L. 94.]

LENEY v. HILL. [1870 L. 93.]

Proof of Debts — Joint and Separate Estates — Proof by Partner against Estate of Co-partner — Principal and Surety.

H., a partner in a banking firm, entered into a bond with a board of guardians, on being appointed their treasurer, with two sureties, one of whom was K., a partner in the firm, and the other was E., who was not a partner. H. kept the account of the guardians' money at his bank under a special heading, "Norwich Union," and a sum of £5,877 was standing to that account when the bank stopped payment. H. died shortly after the stoppage, and his estate was administered in Chancery. The other partners were adjudicated bankrupts. The joint estate and H.'s separate estate were alleged to be insolvent; joint debts, to a large extent remained unpaid; K.'s separate estate was solvent. The amount due to the guardians was paid by E., who recovered by proof upon the separate estate of K., his co-surety, one moiety of the amount paid. The trustee of K.'s separate estate, who was also the trustee of the estate of the bankrupt partners, then claimed to prove against H.'s separate estate for the amount of the moiety paid to E. out of K.'s estate:

Held, that, as the partnership received the money from and owed it to the guardians, the relation of principal and surety never in reality existed between H. and K. The claim was therefore disallowed.

Order of the master of the rolls affirmed.

Whether *Ex parte Topping* (!) would apply to a case where the separate estate in respect of which the proof is sought to be made is solvent, so that any surplus would go to the joint estate, *Quære*.

THIS was an appeal from a decision of the master of the rolls. Sir Robert Harvey, the testator in the causes, had been, for some years previous to his decease, the treasurer of the Norwich Board of Guardians. At the time of his appointment, and thenceforward to his decease, he was a partner in the banking firm of Harveys & Hudsons, the only other partners being Roger Allday Kerrison and Roger Kerrison. On his appointment Sir R. Harvey, together with his brother, Edward Kerrison Harvey, 442] and his partner, Roger Allday Kerrison, *executed a bond, dated the 23d of October, 1860, which recited that Sir R. Harvey had been duly appointed treasurer to the board of guardians, and had been required by them to enter into a bond, with two sufficient sureties, for the due discharge of his office and of the trusts reposed in him; and thereby Sir R. Harvey, E. K. Harvey, and R. A. Kerrison became jointly and severally bound in the penal sum of £10,000 for the due discharge by Sir R. Harvey of his duties as treasurer. All sums of money received by Sir R. Harvey as treasurer were deposited in Harveys & Hudsons' Bank, to the credit of an account headed "Norwich

(¹) 4 D. J. & S., 551.

Union." The bank stopped payment on the 16th of July, 1870, on which day R. A. Kerrison and R. Kerrison filed a declaration of insolvency; and on the 22d of July they were adjudicated bankrupts. Sir R. Harvey died on the 19th of July, before he could be adjudicated bankrupt, and his estate was being administered in Chancery in the above suits, of which the first was the suit of a separate creditor of Sir R. Harvey, and the second that of a joint creditor of the firm of Harveys & Hudsons. At the time of the stoppage of payment there was standing to the credit of the account headed "Norwich Union" the sum of £5677 14s. 1d. This sum was paid to the guardians by E. K. Harvey as surety; and he then proved in the bankruptcy against the separate estate of R. A. Kerrison, his co-surety, for half of that sum, namely, £2838 17s., which, as Kerrison's separate estate was solvent, he received in full. The trustee in bankruptcy of the separate estate of R. A. Kerrison then claimed to prove in the suits in Chancery on behalf of the separate estate of R. A. Kerrison against the separate estate of Sir R. Harvey for the £2838 17s. paid out of the separate estate of R. A. Kerrison to E. K. Harvey, alleging that the separate estate of Sir R. Harvey was insolvent. As to this allegation, there was evidence on behalf of the executor of Sir R. Harvey, the defendant in the suits, to show that it was impossible to say whether it was true or not. The joint estate was also alleged to be insolvent. At any rate joint debts to a large extent remained unpaid. The master of the rolls refused the claim, and the trustee, E. C. Bailey, appealed *from this decision (*). [443 The appellant was also the trustee in bankruptcy of the joint estate of R. A. Kerrison and R. Kerrison.

Mr. Fry, Q.C., and Mr. Cozens-Hardy, for the appellant: Under the circumstances of this case Sir R. Harvey's estate must be administered as in bankruptcy: *Lodge v. Prichard* (*);

(*) 1872, Nov. 27. LORD ROMILLY, M.R., after stating the facts of the case, said that, without expressing an opinion as to the case of *Ex parte Topping*, although it surprised him when cited in the argument, he thought that it did not govern the present case. This claim, if successful, would be, in fact, taking away from an insolvent separate estate a sum to be added to the joint estate, which was quite a different matter, as well as being at variance with the rule in bankruptcy, which forbade proof by one partner against his co-partners' estate whilst joint creditors remained unpaid, a rule which enured for the benefit of the separate creditors as well as of the joint creditors. If this claim

were allowed, the dividend of the separate creditors of Sir R. Harvey would be lessened, and the amount taken from that dividend would be added to the surplus of R. A. Kerrison's solvent separate estate, and thence be paid over for distribution amongst the joint creditors of the firm. It would be contrary to the rules in equity that separate creditors of one partner should thus be made to contribute towards payment of the joint debts, and opposed to the principles on which estates are administered in bankruptcy. Without reference to cases the principle was clear and the application must be refused.

(*) 1 D. J. & S. 610.

and the case is governed, as an exception to the usual rule in bankruptcy that on the bankruptcy of a firm there cannot be a proof on behalf of the estate of one partner against the estate of another until all the joint debts are paid, by the decision in *Ex parte Topping* ⁽¹⁾. The case of *Ex parte Collinge* ⁽²⁾, which was cited against us in the court below, is distinguishable. It is no objection that the admission of the proof would benefit the joint creditors, because the estate of the creditor partner, which seeks to prove against the co-partner's insolvent separate estate, is itself solvent, so that what is recovered will go towards the fund of the joint creditors, for whom the appellant is also trustee, for that very case is contemplated by Lord Westbury in *Ex parte Topping*. Nor is it an objection that the joint creditors have had the benefit of the deposit which was in the bank at the time of the stoppage; for as the separate estate of a partner cannot prove against the joint estate, no right in the nature of a 444] set-off can arise: *Ex parte Harris* ⁽³⁾. The bond executed by the parties expressly stated the occasion on which it was executed, and that R. A. Kerrison was only a surety. [They also referred to *Ex parte Kingston* ⁽⁴⁾.]

Sir R. Baggallay, Q. C., and Mr. Horton Smith, for the plaintiff in the suit of *Lacey v. Hill*, representing the separate creditors of Sir R. Harvey.

Mr. Southgate, Q. C., and Mr. Merewether, for Sir R. Harvey's executor, and Mr. Ford North, for some of the separate creditors, who had obtained liberty to attend the proceedings, were not called on. They referred, however, to *Ex parte Bass* ⁽⁵⁾.

Sir W. M. JAMES, L. J. : I am of opinion that the order of the master of the rolls ought to be affirmed. There is always a great number of nice and complicated questions arising upon the rules in bankruptcy as to joint and separate estates. The rules so laid down are a sort of rough code of justice, because some rule must be laid down for the purpose of keeping joint and separate estates distinct, and for paying the joint and separate creditors. But that is a mere artificial distinction. There is nothing like that known to the common law, and there being those rules, a great number of difficulties necessarily occur. As a general rule, a separate estate cannot prove against a joint estate and a joint estate cannot prove against a separate estate till the creditors of the respective estates sought to be proved against are satisfied. The joint estate cannot prove against the separate estate, however much the insolvency of the joint estate may be attributed to the conduct of the partner whose sep-

⁽¹⁾ 1 D. J. & S., 551.

⁽²⁾ Ibid., 533.

⁽³⁾ 2 V. & B., 210.

⁽⁴⁾ Law Rep., 6 Ch., 632.

⁽⁵⁾ 36 L. J. (Bkcy.), 39.

arate estate is being administered. In *Ex parte Topping* (1) the court held that the rule as to proof between the two separate estates of the two partners may, in certain cases, be relaxed. But in the case before us the real contention is in substance an *effect on behalf of the trustee of the joint estate (for the [445 appellant also fills that character) to get in from the separate estate of Sir R. Harvey, which is alleged to be insolvent, in competition with the separate creditors of that estate, something which is to go into the joint estate for the benefit of the joint creditors. And there is this peculiarity in this case, that beyond all question there never was in reality the relation of principal and surety between the two partners. The partnership received the money of the guardians, and the partnership owed the money to them, and it would be a violation of every principle of equity that the joint estate, whose default has been the origin of the whole difficulty, should get from the separate estate of one of the partners something the abstraction of which would prejudice that partner's separate creditors, and would go, under the actual circumstances of the case, to enlarge the assets of the joint estate, which has already received the whole of the money.

SIR G. MELLISH, L.J. : I am of the same opinion. If it had been necessary to determine how far *Ex parte Topping* (1) should be held to apply to a case where the separate estate in respect of which the proof is sought to be made is solvent, so that any surplus would go to the joint estate, I should have liked to take further time for consideration ; but it appears to me that it is impossible that the proof, the rejection of which is now under appeal, can be allowed in a case like this, where, practically, it is the partnership which is primarily liable to pay the debt to the guardians. If all had remained solvent, and those liabilities had been properly settled, the partnership which had received the £5677 14s. 1d. in money would have had to repay it. Under the circumstances of this case I think it would be unjust to allow a proof to be made against the separate estate of Sir R. Harvey merely to increase the funds of the joint estate. The appeal will be dismissed with costs.

Solicitors: Messrs. *Sole & Co.* ; Messrs *Linklaters & Co.* ; Messrs. *Norris, Allens, & Carter.*

(1) 4 D. J. & S., 551.

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In re Gresham Life Assurance Society. Ex parte Penney.

[Law Reports, 8 Chancery Appeals, 446.]

L.J.J. Dec. 20, 1872.

**446] *In re GRESHAM LIFE ASSURANCE SOCIETY. Ex parte
PENNEY.**

Company — Transfer of Shares — Power of Directors to refuse to register Transfer — Rectification of Register — Insurance Company.

The deed of settlement of a life insurance company provided that any shareholder should be at liberty to transfer his shares to any other person who was already a shareholder, or who should be approved by the board of directors, and that no person not being already a shareholder, or the executor, etc., of a shareholder, should be entitled to become the transferee of any share unless approved of by the board:

Held (reversing the decision of the master of the rolls), that the directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the board; and that, in the absence of evidence to the contrary, the court would take for granted that they acted reasonably and *bona fide*. But if there is evidence to show that directors who have such a power have exercised it capriciously or unfairly, the court has jurisdiction to interfere, and this jurisdiction may be exercised on a summons under the 35th section of the Companies Act, 1862.

Robinson v. Chartered Bank (') distinguished.

THIS was an appeal from a decision of the master of the rolls. The Gresham Life Assurance Society was a company registered under the Joint Stock Companies Act, 1844 (7 & 8 Vict. c. 110), and afterwards registered under the Companies Act, 1862.

The 17th clause of the deed of settlement was as follows: "That subject to the provisions herein contained, and subject also to the provisions of the Joint Stock Companies Act, so long as the company shall be subject to the provisions of that act, every shareholder shall be at liberty to sell and transfer his shares to any other person who shall already be a shareholder, or who shall have been approved of as such by the board of directors, and that no person not already a shareholder, or the executors or administrators, legatee or next of kin, of any shareholder shall be entitled to become the transferee of any share unless approved of by the board; and that whilst any call or installment, or interest on any call or installment, shall be in arrear or un-
447] paid upon or in respect of any *share, the same shall not be transferable otherwise than by operation of law without the special leave of the board of directors; and any transfer of shares not effected by operation of law must be according to the form A in the first schedule hereto, or to the like effect."

On the 4th of May, 1872, Mr. J. R. De Paiva sold ten shares in the company, of which he was the registered owner, to Mr.

(') Law Rep. 1 Eq., 32.

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W. J. Penney. The shares were sold on the Stock Exchange in the ordinary way, and the transfer was executed by De Paiva and lodged for registration at the company's office, but the directors, having considered the subject at a board meeting, refused to register it. In reply to a letter from De Paiva, the directors declined to give any reason for objecting to Penney as a shareholder; and in an affidavit filed by the secretary he stated that the directors had come to the conclusion at which they had arrived "upon deliberation and after consideration, and with reference only to the circumstances of the case." De Paiva and Penney accordingly joined in a summons, under the 85th section of the Companies Act, 1862, calling upon the company to rectify the register by inserting the name of Penny in place of De Paiva. The master of the rolls granted the application, and from this decision the company appealed (¹).

Mr. Fooks, Q.C., and Mr. Locock Webb, for the appellants: The question depends entirely on the clause in the deed of *settlement, by which absolute power of approval or dis- [448] approval is given to the directors. There is no obligation in them to disclose their reasons. It might expose them to an action to do so, and at all events would, in many cases, lead to serious inconvenience. If any fraud or improper motives were proved, or if the directors had refused to consider the subject, the case would be different, but no such case is made here, and it is proved that the resolution was taken after deliberation: *Bargate v. Shortridge* (²); *Walker's Case* (³); *Birmingham v. Sheridan*. (⁴).

This is not a case which can be determined under the 85th section of the Companies Act, the applicants ought to have filed a bill: *Simpson's Case* (⁵); *Ward and Henry's Case* (⁶).

[SIR W. M. JAMES, L.J.: We both think that we have full jurisdiction to decide the case under the 85th section of the Com-

(¹) 1872, Nov. 25. LORD ROMILLY, M.R., said that the arguments addressed to him on behalf of the company amounted to this, that under the 17th clause in the deed of settlement the directors were at liberty to refuse to register any transfer to any person not already a shareholder without giving any reason for their refusal. In his opinion, the real meaning of the clause was, that when a shareholder had sold shares to any person not already a shareholder, and the name of the purchaser became known to the board, they might refuse to register it if they had any reasonable ground of objection to the purchaser; and the court was the judge

whether the objection was reasonable. If they had a reason for refusing to register the transfer they might refuse, and a slight reason might do; but they must give it. They could not refuse to register without any reason out of caprice or from fraud. The board had given no reason why this transfer should not be registered, and he must take it that it was done capriciously. The application to rectify the register must be granted.

(²) 5 H. L. C., 297.

(³) Law Rep., 2 Eq., 554.

(⁴) 33 Beav., 660.

(⁵) Law Rep., 9 Eq., 91.

(⁶) Ibid., 2 Ch., 481.

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panies Act, 1862, subject to the discretion which the court has to direct a bill to be filed if it should think it desirable.]

Mr. *Romer*, Q.C. (Mr. *Southgate*, Q.C., with him), for the respondents: The directors have no power to refuse to register a transfer without assigning a cause. If they refuse to give their reason, it must be assumed that they have none, and that they are acting capriciously, if not fraudulently. We have filed an affidavit that Mr. Penney is in all respects a fit and proper person to be a shareholder, and as the directors have not cross-examined the witness nor replied to the affidavit, it must be taken to be true. This is not an ordinary partnership, but a joint stock company, and the court will, therefore, construe its rules favorably so as to facilitate the transfer of shares: *Weston's Case* ⁽¹⁾; *Poole v. Middleton* ⁽²⁾; *Robinson v. Chartered Bank* ⁽³⁾; *Pinkett v. Wright* ⁽⁴⁾; *Slee v. International Bank* ⁽⁵⁾; *Taft v. Harrison* ⁽⁶⁾.

449] *SIR W. M. JAMES, L.J.: In this case I feel compelled to come to a different conclusion from that of the master of the rolls. The clause in the deed of settlement appears to me very clear, which provides that no transfer shall be made to any person outside the company unless that person shall be approved of by the board of directors. No doubt the directors are in a fiduciary position both towards the company and towards every shareholder in it. It is very easy to conceive cases such as those cases to which we have been referred, in which this court would interfere with any violation of the fiduciary duty so reposed in the directors. But in order to interfere upon that ground it must be made out that the directors have been acting from some improper motive, or arbitrarily and capriciously. That must be alleged and proved, and the person who has a right to allege and prove it is the shareholder who seeks to be removed from the list of shareholders and to substitute another person for himself. Therefore, if a case had been made out such as was made in one of the cases cited, where a man attempted to transfer his shares, and a demand had been made upon him for the payment of a debt which they had no right to make a condition precedent to such transfer; or if the directors had said to a shareholder, "We will not allow you to transfer your shares unless you give us each a present of £10," this court would have jurisdiction to deal with it as a corrupt breach of trust; but if there is no such corrupt or arbitrary conduct as between the directors and the person who is seeking to transfer his shares, it does not appear to me that this court has any juris-

⁽¹⁾ Law Rep., 4 Ch., 20.

⁽²⁾ 29 Beav., 646.

⁽³⁾ Law Rep., 1 Eq., 32.

⁽⁴⁾ 2 Hare, 188.

⁽⁵⁾ 17 L. T. (N.S.), 425.

⁽⁶⁾ 10 Hare, 489.

diction whatever to sit as a court of appeal from the deliberate decision of the board of directors, to whom, by the constitution of the company, the question of determining the eligibility or non-eligibility of new members is committed. If the directors had been minded, and the court was satisfied that they were minded, whether they expressed it or not, positively to prevent a shareholder from parting with his shares, unless upon complying with some condition which they chose to impose, the court would probably, in exercise of its duty as between the *cestui que trust* and the trustees, interfere to redress the mischief, either by compelling the transfer or giving damages, or in some mode or other to redress the mischief which the *shareholder [450] would have had a just right to complain of. But if it is said that wherever any shareholder has proposed to transfer his shares to some new member, the court has a right to say to the directors, "We will presume that your motives are arbitrary and capricious, or that your conduct is corrupt, unless you choose to tell us what your reasons were, and submit those reasons to our decision," it would appear to me entirely altering the whole constitution of the company as provided by the articles. I cannot conceive that any director would choose to accept office, or exercise the power entrusted to him, if he were liable to be called upon to say what the particular reasons were or the particular motive was which influenced him in coming to the conclusion that any person was not eligible as a shareholder. I think, therefore, that these directors were well advised in not subjecting themselves to be cross-examined and interrogated as to what particular reasons they might have for personally objecting to this gentleman, and in confining themselves to saying, by their secretary, that the question was discussed at a board of the directors, that the propriety of the transfer to the particular transferee was the subject matter for discussion, and having taken that into their consideration, they had arrived at the conclusion to which they had arrived. This conclusion, of course, in the absence of any suggestion to the contrary, or of any evidence to the contrary, we must take to be a *bonâ fide* conclusion on their part that, for some reason or other connected with the interests of the company, they did not think it fit to recognize that gentleman as a transferee. That gentleman was not then and is not up to the present moment in any relation of *cestui que trust* towards them, and therefore he has no right to complain, and the transferor has no right to complain unless he can induce us to believe that he could not find some other purchaser for those shares, either among the shareholders or outside the company, more agreeable to the directors, and who would give the same price. I am of opinion

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that we cannot sit as a Court of Appeal from the conclusion which the directors have arrived at if we are satisfied that the directors have done that which alone they could be compelled by mandamus to do, to take the matter into their consideration. It appears that they have taken the matter into their consideration, *and there is nothing to show that they have acted otherwise than honestly and fairly. I am of opinion, therefore, that the order of the master of the rolls ought to be discharged.

SIR G. MELLISH, L.J. : I am of the same opinion. It is quite clear that if this question were raised in a court of law the court could not compel the registration of the applicant, because that which is made by the articles a condition precedent to his becoming a shareholder never has been performed, namely, his approval by the directors; but if the directors had refused to take the matter into their consideration a court of law would, by mandamus, have compelled the directors to take it into their consideration, but unquestionably it could not have compelled them to approve him. I admit that the question, to a certain extent, is different in a court of equity. It has been held, under the 35th section of the Companies Act, that the court may enter into equitable considerations, and I am disposed to think, although it is not necessary distinctly to decide it in this case, that if it were made out that the directors were committing a breach of trust towards any one of their shareholders in refusing to allow him to transfer his shares for a purely arbitrary reason, that might be a ground why the court should interfere. But, on the other hand, this being an insurance company, it is quite obvious that it may be a matter of very great importance to the company that they should have a substantial body of shareholders. The very existence and credit of the company may depend upon that, and in order to procure that by the deed of settlement the directors are invested with an absolute power to reject any transferee. Then it is said that they ought not to have objected arbitrarily, to which I agree. But it is further contended that in order to secure the existing shareholder against being deprived of the right to sell his shares, the directors are bound to give their reason why they reject the transferee; and if they reject him without giving a reason that is a ground from which the court ought to infer that they were acting arbitrarily. I cannot agree with that. It appears to me that it is very important that directors should be able to exercise the power in a perfectly uncontrollable manner for the benefit of the shareholders; but 452] it is impossible *that they could fairly and properly exercise it if they were compelled to give the reason why they rejected a particular individual. Take the most ordinary

reason why they are entitled to reject him, viz., that they believe him to be in a state of insolvency or that they could not discover what his pecuniary position was. Are they to state that as their reason for doing so? Is it to be said that they are bound to admit anybody as a shareholder, whatever doubts they may have as to whether he is insolvent or not, or whether he is pecuniarily able or not to pay the calls? Are they to be prevented from rejecting a person on that ground unless they openly say so and inform him that that is the ground upon which they reject him? It is perfectly obvious that directors would never like to exercise their power if they were liable to be called upon to exercise it under those conditions, because, of course, the shareholder would immediately challenge their decision, he would make an application to a court of equity to have the matter tried, and they would at once be involved in a considerable litigation. Or they might be reluctant to run the risk of publishing their opinion as to the solvency of a person for fear of bringing on his bankruptcy, whereas if nothing was said he might be able to get through his difficulties in a perfectly solvent condition. So also if the objection involved something against the man's character, if they were to be obliged to tell it, of course the matter would be instantly challenged. Actions might be brought, and the directors might be examined and cross-examined as to what the grounds for their imputation were. I am, therefore, of opinion that in order to preserve to the company the right which is given by the articles a shareholder is not to be put upon the register if the board of directors do not assent to him, and it is absolutely necessary that they should not be bound to give their reasons, although I perfectly agree that if it can be shown affirmatively that they are exercising their power capriciously and wantonly, that may be ground for the court interfering. In my opinion we are not at all overruling any case that has been decided heretofore. The case most relied on as most nearly touching the question is *Robinson v. Chartered Bank* (*). That was decided on demurrer, and, moreover, there was in that case direct and *positive evidence that the directors were refusing to allow [453 Mr. Robinson to assign his shares at all to anybody. I quite agree that this would be a breach of trust towards the shareholders. They have no right to say, "We will force a particular shareholder to continue a shareholder, and we will not allow him to transfer his shares at all." That would be an abuse of their power. In the same way it would be an abuse of this power to object, on any ground not applying personally to the transferee, to say, for instance, that a particular shareholder

(*) Law Rep. 1 Eq., 32.

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should not transfer his shares till he had given security for the calls. Those would be plain cases of abuse, and I do not find any single case where it has been held that the directors, under a power like this, are bound to communicate the reasons for which they reject the intended shareholder.

Solicitor for the appellants: Mr. *T. H. Devonshire*.

Solicitors for the respondents: Messrs. *Mackenzie, Trinder, & Co.*

[Law Reports, 8 Chancery Appeals, 454.]

L.C. and L.J.M. March 17, 1878.

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*YATES v. UNIVERSITY COLLEGE, LONDON.

[1861 Y. 15.]

Will — Construction — Condition rendered impossible by Testator — Bequest to found a Professorship according to certain Rules.

A testator gave certain personal estate to a college for founding a professorship of archaeology, for the regulation of which professorship he purposed preparing a code of rules and regulations; and he directed that his executors should, as soon as they conveniently could after his death, communicate the bequest, together with a copy of the rules and regulations, to the college, and that, within twelve months after the bequest had been so communicated to them, the college should signify their acceptance of the rules and regulations; and in case the college should decline to accept them, the bequest should be void, and the property should sink into his residuary estate.

The testator died without preparing any rules and regulations for the professorship:

Held (reversing the decision of *Bacon, V.C.*), first that the reference to the proposed rules could not be read as a description of the professorship intended to be founded, but merely as a condition attached to the bequest; and, secondly, that as the condition had become impossible by the act of the testator, the bequest took effect absolutely.

THIS was an appeal from a decision of Vice Chancellor Bacon. James Yates, late of Lauderdale House, Highgate, by his will, dated the 24th of February, 1864 (amongst other things), bequeathed as follows: "I give and bequeath all dividends, income, and annual produce of a sum of £3980 consolidated stock of the London and North Western Railway Company, now held by me, and all other the stocks, shares, and debentures of and in the said company which I may be possessed of or entitled to at the time of my decease, unto my said wife, if she shall survive me, during her life, subject nevertheless to the payment by my said wife, out of the said dividends and annual income, to John Morris, Esq., professor of mineralogy and geology at University College, London (if he shall survive me), during the joint lives of him and my said wife, of the yearly sum of £25. And from and immediately after the decease of my said wife I give and bequeath the said stock, shares, and debentures of and in the

said London and North Western Railway Company to *University College, London, upon trust to pay the annual [455 income thereof to the professor of mineralogy and geology for the time being of that college, as an endowment of the said professorship. And I give and bequeath the dividends, interest, and annual income of the sum of £5500 consolidated stock of the North London Railway Company (formerly called the East and West India Docks and Birmingham Junction Railway Company), and also the ninety new shares of £10 each in the same company, £5 whereof per share has been paid up, and also the fifty preference shares of £20 each in the same company, to which stock or shares I am now entitled ; and all other the stock, shares, and debentures of and in the same company, which I may be possessed of or entitled to at the time of my decease, unto my said wife during her life ; and from and immediately after her decease, then I give and bequeath the same stock and shares, and the dividends, interest, and annual income thereof, unto the said University College, London, for the purpose of founding in it a new professorship of archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations which I intend to authenticate under my hand. And I hereby expressly declare my will and mind to be, that as soon as conveniently may be after my decease my executors shall communicate to the said University College the fact of my said last mentioned bequest to the said college, and a copy of the said rules and regulations ; and the said University College shall, within twelve calendar months next after the fact of the said bequest shall have been communicated by my said executors as aforesaid, signify by writing, under the hand of their president, treasurer, or secretary, their acceptance of the said rules for the future regulation of the said professorship. And I further declare that, if the said University College shall decline or refuse to accept the same rules for the regulation of the said professorship, or shall not, within the said space of twelve calendar months, signify to my executors, in manner aforesaid, their acceptance of the same, then I declare that the said bequest of the said stock, shares, and debentures, and every other legacy and bequest herein or in any codicil hereto contained in favor of the said University College, shall be wholly null and void, and the said stock and shares, and all other benefits hereby or by any codicil hereto, by me intended for the *said University College, shall sink into and form part of [456 my residuary estate. And I give to the said University College (but subject to the conditions aforesaid) all my books on mineralogy and geology, and also my mineralogical and geological specimens, to be arranged and preserved by the professor of

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mineralogy and geology, and employed by him as he shall see occasion at his lectures, or by any other professor or lecturer in the same college who may require the use of them. I give to the said University College all my casts of antique coins, statues, and all other antiquities in my possession at the time of my decease, to be arranged and preserved by the aforesaid professor of archæology, and employed by him as he shall see occasion at his lectures, or by any other professor or lecturer in the same college who may require the use of the same. I also give to the said University College all my books, maps, plates, and drawings, being illustrations of Greek and Roman antiquities; and it is my wish that the same shall be added to the library of that college, more especially for the use of the said professor of archæology and the benefit of his pupils. And I also give to my great nephew Henry Yates Thompson, if living at my death, but if he be not then living, then to such person as, if there be no females living at my decease, would be my heir-at-law, my share in the same college, with the intent that the same share shall always be held and enjoyed by my heir-at-law for the time being, so that he may have means of knowing whether my various bequests in favor of the college, and the two aforesaid professorships, are applied and maintained as I have endeavored to prescribe and appoint." The testator directed that his charitable legacies should be paid out of his pure personal estate, and that all legacy duty should be paid out of his residuary personal estate. He then bequeathed his residuary personal estate to his wife absolutely, and appointed her and two other persons (one of whom had declined to prove and refused to act) his executors.

The testator died on the 1st of May, 1871. The bill was filed on the 21st of December, 1871, by the widow, Dorothea Yates, against the college, and the other acting executor, alleging that the testator did not at any time before his death prepare any code of rules and regulations for the new professorship of archæology in his will, which were authenticated *under his hand, and praying for a declaration that, in the events which had happened, the bequests of the railway stocks, shares, and every other legacy and bequest contained in the will in favor of the college, were wholly null and void; that such stocks, shares, and debentures, and other legacies and bequests, formed part of the residuary estate of the testator; and that the plaintiff was absolutely entitled to the same as residuary legatee. (1).

(1) 1872, Dec. 2. SIR JAMES BACON, V.C.: This case has been argued very fully and elaborately, and very satisfactorily, because I believe every case of any importance that bears upon the question of conditional gifts in wills, and upon the performance of such conditions, has been referred to. But after all, none of the authorities have much bearing upon the question. The

The vice-chancellor held that the gifts to the college failed, and that the property passed to the residuary legatee. The college appealed from this decision.

*Mr. *Amphlett*, Q.C., and Mr. *Cozens-Hardy*, for the appellants, were stopped by the court ⁽¹⁾.

really important consideration is, what is the construction of this will, because it is upon that, and upon that alone, that the judgment of the court can be founded; and without looking to circumstances extraneous to the will, but reading only the will as it stands, I find that a gentleman, being in some way connected with or attached to University College, intends, at the time he pens his will, to confer a benefit on the college. But it is upon two conditions, one of which has been very little adverted to in the course of the argument. The first and most important condition is: "If I shall draw up rules and regulations, then it will be known what is to become of my legacies." The other condition is the acceptance of those rules and regulations by the college. And that makes the great distinction between the case now before the court and those cases where conditions have been imposed, the performance of which is rendered impossible by accidental circumstances, or the act of the testator himself. With that preface, and seeing that the object, and I think the sole motive, of the testator was, that the professorships—or one of them, if they are only branches of the same—should be improved, and that a totally new professorship of archaeology should be established in the college, and that it should be done according to his scheme and will, and in no other way, we find that he makes this disposition:—[His honor then read the bequests, as stated above, and continued:] Is it possible to doubt that his object was that the professorship of archaeology should be conducted according to schemes and rules he should prepare? and, if he died, as he did, without preparing any such rules, how is it possible that any effect can be given to the gift? University College is to hold this legacy upon trust. For what? Upon the trusts which he shall declare by rules and regulations which he intends to prepare. He directs that the fact of the bequest shall be communicated to the college, and a copy of the rules and regulations, and he proceeds: "The University College shall, within twelve calendar months

next after the fact of the said bequest shall have been so communicated by my said executors, as aforesaid, signifying by writing under the hand of their president, treasurer, or secretary, their acceptance of the said rules for the future regulation of the said professorship." When I am asked to consider what the sole motive of the testator was, I answer—No doubt that his sole motive in augmenting the stipends of the professorship of mineralogy and geology, and his sole motive in giving these legacies to found a professorship of archaeology, was that it should be, not as the college might wish, not as they, in their judgment, might prescribe in rules and regulations, but that it should be on his scheme, and unless that could be carried into effect, he meant to make no gift at all. What he provides afterwards shows that to be his plain intention and motive, for he says, making himself the arbiter of the rules and regulations, that if the college would not take it as he prescribed it to them, they should not have that nor any thing else under his will. The question seems to be a mere question of construction; and if the construction which I put on the will is the right one, I believe it is free from all the difficulties which may be said to arise from any of the cases referred to, or the rules to be found in the text books. Without doing violence to the words and meaning of the testator, it seems to me impossible to say that University College can take any benefit under the will. To say they are ready to accept the conditions is to say nothing. It is impossible for them to perform any conditions, because they do not know what they are. The testator had so arranged the matter that it depended on him first to give words to the conditions to make them at all binding on the college, and if he dies, as he has died, without saying in what way he meant his money to be expended, or on what trusts, the gift, in my opinion, wholly fails; and, as a plain consequence, the residuary legatees are entitled to the benefit of the legacies.

⁽¹⁾ The following authorities were cited by the counsel for the college in

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Mr. Kay, Q.C., and Mr. Hallett, for the respondent: The making of the rules by the testator and their acceptance by the college constitute a condition precedent to the gift taking effect. There is nothing illegal or unusual in the condition, nor was its performance impossible at the time when the will was made. It has only become impossible by the testator's own act. Therefore the gift cannot take effect: *Johnson v. Castle* ⁽¹⁾; *Cary* 459] *v. *Bertie* ⁽²⁾; *Lowther v. Cavendish* ⁽³⁾; *Lloyd v. Branton* ⁽⁴⁾; *Harvey v. Aston* ⁽⁵⁾; *Hawkes v. Baldwin* ⁽⁶⁾; *Simpson v. Vickers* ⁽⁷⁾; *Burgess v. Robinson* ⁽⁸⁾; *Acherley v. Wheeler* ⁽⁹⁾; *Wheddon v. Oxenham* ⁽¹⁰⁾; *Davis v. Angel* ⁽¹¹⁾. The condition is of the essence of the gift. The testator had no intention to found a professorship, except in accordance with the scheme which he proposed to draw up; and as he never drew up any rules, it must be supposed that he altered his mind, and gave up the intention to found the professorship.

Mr. Hinde Palmer, Q.C., for the executor.

LORD SELBORNE, L.C.: It appears to us that this is a mere question of construction, as to which I am bound to say that I agree with the vice chancellor in thinking that very little light or assistance is afforded to the court by the numerous authorities to which reference has been made.

The testator, by present words of gift, subject to a life interest to his wife, expresses himself thus: "And from and immediately after her decease, then I give and bequeath the same stock and shares, and the dividends, interest, and annual income thereof, unto the said University College, London, for the purpose of founding in it a new professorship of archæology." The question arises, not upon those words, but upon the clause which follows. I pause here, however, for the purpose of saying that, so far, there is an immediate bequest, which, unless controlled or qualified by something afterwards found in the will, clearly vests an immediate interest by way of remainder in these particular funds in University College, London, for the purpose of founding a new professorship of archæology. Because, first of all, the words "I give and bequeath" are unaccompanied by any terms of condition or contingency; and, secondly, the law always leans in favor of the vesting of remainders, and does not, unless there is something to make that construction necessary, 460] construe them to be in suspense or *contingency. Then

the court below: *Darley v. Langworthy*, 3 Bro. P. C. 359; *Ring v. Hardwick*, 2 Beav., 352; 1 Jar. on Wills, 827. 1 Swin. on Wills, 387, 404; Williams on Executors (6th Ed.), 1173.

⁽¹⁾ 8 Vin. Abr., 104, pl. 2.

⁽²⁾ 2 Vern., 333.

⁽³⁾ 1 Eden. 99, 3 Bro. P. C., 186.

⁽⁴⁾ 3 Mer., 108.

⁽⁵⁾ 1 Atk., 361.

⁽⁶⁾ 9 Sim., 355.

⁽⁷⁾ 14 Ves., 341.

⁽⁸⁾ 8 Mer., 7.

⁽⁹⁾ 1 P. Wms., 733; Comyns Rep., 513.

⁽¹⁰⁾ 2 Eq. Ca. Ab., 546, 547.

⁽¹¹⁾ 10 W. R., 722.

the question is, what is the effect of the next words which follow, and which I will read, in connection with the first? "For the purpose of founding in it a new professorship of archæology, for the regulation of which professorship I purpose preparing a code of rules and regulations which I intend to authenticate under my hand." When endeavoring to find out for myself by what road the learned judge below might have arrived at the conclusion he did, the most likely explanation of his honor's view that occurred to me was this — that those words referring to a code of rules and regulations were to be read, in connection with the words which precede them, "for the purpose of founding in it a new professorship of archæology," as defining the particular professorship which he meant to found; so as to make the regulation of that professorship by those rules part of the definition of the professorship itself; excluding, therefore, the idea that he meant to found any professorship of archæology, except one regulated by the rules which he was to prepare. But is that a sound construction of the words? I clearly think it is not — for two reasons. One reason is this — that if the testator had only intended something to be done by himself afterwards, he had always the power, since it was not convenient for him to do it then, of making a future codicil or a future will. Here he plainly intends to do something at present, and he speaks of a further purpose and intention which he has of doing something else hereafter. Are we to nullify the present, and make it to be entirely suspended upon a future act, whether that future act was viewed by him as a testamentary act or not? It seems to me to be against every right principle of construction to say that words of immediate gift, which are perfectly sensible as they stand in the will, are to be narrowed by the declaration of his intention to do something in future which he does not think fit to do at that time. There is another reason which, to my mind, is equally conclusive. Regulation, in the case of a charity, is one thing — foundation is another. A scheme, rules, and regulations presuppose a foundation to be regulated. What the testator does is to create the substance of the foundation; and then he tells us that he contemplates and intends providing a code of regulations afterwards. The fact is that he does something now, and whether he shall do the *rest which he contemplates hereafter or not depends [461] upon himself. In the result he has not done it. Therefore I reject the suggestion that the future regulation of this professorship is a thing of the essence of the foundation itself. But if that conclusion is rejected, there is nothing else in the will upon which a shred of argument could be based. The testator contemplates preparing a code of rules and regulations which could

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have no existence unless he did prepare them, and then, upon the supposition that he does so, he goes on to declare his will, so far as it is dependent upon that: "I hereby expressly declare my will and mind to be that, as soon as conveniently may be after my decease, my executors shall communicate to the said University College the fact of my said last mentioned bequest, and a copy of the said rules and regulations." They could not, of course, communicate a copy of rules and regulations which did not exist: there could be no obligation on the part of the executors to communicate a thing not existing. The college was to have twelve months after the communication was made to declare whether they would accept the rules or not. That illustrates the meaning of certain passages in some of the authorities which speak of some impossible conditions as not being enough to defeat a gift, even when they are in form precedent; the real meaning of which is that a condition may be expressed with relation to some matters which are of such a nature that there is no condition at all unless those matters exist. All that is said about the rules presupposes the existence of the rules, and anything presupposing the existence of the rules simply falls to the ground, and is no condition at all, if the rules do not exist. It is unnecessary to go into an examination of what the legal effect would be if there were such rules, though I take it to be clear that the forfeiture could not in any case have arisen until a communication was made by the executors, and that could not have been made until they had a copy of the rules to communicate, and the college would never lose the bequest unless they had declined or refused to accept the rules then communicated, or had omitted within twelve calendar months to signify in writing their acceptance of those rules when communicated. My judgment, therefore, is in favor of the appeal.

462] *SIR G. MELLISH, L.J.: I am of the same opinion.

Solicitors for the appellants: Messrs. *Cookson, Wainwright, & Pennington*.

Solicitors for the respondents: Messrs. *Hyde & Tandy*.

[Law Reports, 8 Chancery Appeals, 402.]

L.C. and L.J.M. March 19, 20, 1873.

CAMPS V. MARSHALL.

[1871 C. 147.]

Defendant of Unsound Mind — Entering Appearance.

The plaintiff and his sister had given a mortgage to M, a solicitor, and the bill was filed against M and the sister to have accounts taken of what was due, and

for redemption. The sister was alleged to be of unsound mind, though not found so by inquisition. The plaintiff's solicitor did not serve the bill on the sister, but, by the plaintiff's instructions, assumed to act for her, entered an appearance in her name, and obtained at the rolls the appointment of a guardian *ad litem*. The appearance and the appointment of a guardian were discharged by Wickens, V. C., on evidence that the sister had sufficient capacity to authorize a solicitor to act for her, and that she had authorized M so to act:

Held, on appeal, that whether the capacity of the sister was proved or not, the order of the vice chancellor was right, for that the appearance and the appointment of a guardian founded on it were irregular.

THIS was a motion by way of appeal from an order of Vice Chancellor Wickens. The original bill in this cause was filed on the 1st of July, 1871, against William Marshall, a solicitor, and Ann Camps, a sister of the plaintiff, to have accounts taken for the purpose of ascertaining the amount due on a mortgage from the plaintiff and Ann Camps to Marshall, and to redeem on payment of what should be found due. After Marshall had answered, the bill was, on the 27th of September, 1872, amended. Ann Camps, who was alleged to be of unsound mind, was not served either with the original or the amended bill; but on the 27th of September, 1872, Mr. J. B. Monckton, the plaintiff's solicitor, by the plaintiff's instructions, entered an appearance for her, and on the 18th of November, *1872, on an affidavit by himself and by a medical man who had visited her, he obtained an order at the rolls assigning Thomas Henry Gardiner as her guardian. It was stated at the bar that this course was commonly followed. On the 10th of December, 1872, Mr. Bartlett, the defendant Marshall's agent, took out a summons to set aside the appearance entered for Ann Camps and the appointment of a guardian. This was supported by an affidavit of two persons to the effect that Ann Camps was competent to manage her affairs, and had retained Marshall to act for her in the suit, and a retainer signed by her was afterwards produced. On the 18th of January, 1873, Vice Chancellor Wickens made an order that the appearance entered for Ann Camps should be withdrawn, and the order of the 18th of November, 1872, discharged. A motion was now made on behalf of Mr. J. B. Monckton, and Mr. Gardiner, to discharge this order of the vice chancellor.

Mr. *Morgan*, Q. C., and Mr. *G. W. Collins*, for the appeal motion, referred to *Charlton v. West* ⁽¹⁾, and contended that the proceedings were regular: Daniells Ch. Pr. ⁽²⁾; and that the vice chancellor had taken an erroneous view of the evidence and incorrectly come to the conclusion that Ann Camps was of sufficiently sound mind to give a retainer. They proposed, if the court felt doubt, that a physician should be appointed by the

(1) 3 D. F. & J., 156.

(2) 5th Ed., p. 160.

court to see Miss Camps, the plaintiff undertaking to pay the fee, or that an inquiry should be directed : *Lee v. Ryder* ⁽¹⁾.

Mr. *Hardy*, Q.C., and Mr. *Speed*, *contra*, were not called upon.

LORD SELBORNE, L.C. : The order which the vice chancellor has discharged was not obtained in accordance with the practice of the court, and whatever may be the grounds on which his honor has gone, we concur in the conclusion at which he has arrived. The general order (Cons. Ord. VII, rule 3) points out the course to be taken by a plaintiff who has difficulty in proceeding on account of a defendant *being of unsound mind. First, he must prove that he has served the defendant with process in the proper manner, according to the rules of the court. Then, on the defendant's default, in not appearing, the plaintiff must come to the court, and the court will inquire into the circumstances. An application to the court is required that the court may exercise its discretion, and unless the relations of the defendant intervene it usually appoints the solicitor to the suitors' fund to conduct the defense. It is quite inadmissible that the plaintiff should instruct a solicitor to take steps on behalf of a defendant of unsound mind, and I am disposed to think that even if a disinterested friend were to intervene it would be necessary to prove service of the bill ; but it is better not to decide that point till it arises. I see no reason to suppose that the plaintiff's solicitor acted otherwise than in good faith, and this accounts for the vice chancellor not having given costs. It has been urged that if the order of the 18th of November, 1872, is discharged, we ought, on the materials before us, to take the matter into our own hands and see that this lady is provided with proper protection. I doubt, however, whether we can thus proceed of our own motion ; and I am not satisfied, on the evidence, that the vice chancellor came to an erroneous conclusion in considering that she was capable of authorizing a solicitor to act for her. If she was so capable it is not for us, especially at this stage of the cause, to determine whether she is doing well in intrusting her affairs to a co-defendant whose interest the plaintiff considers to be adverse to hers. In our other jurisdiction we propose to call the attention of the commissioners in lunacy to this case.

SIR G. MELLISH, L.J. : I am of the same opinion.

Solicitors : Messrs. *Monckton & Co.* ; Mr. *T. H. Bartlett*.

⁽¹⁾ 6 Madd., 294.

EQUITY CASES

(Including Bankruptcy Cases)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE,

CHIEF JUDGE IN BANKRUPTCY.

[Law Reports, 15 Equity, 1.]

M. R. July 6; Nov. 4, 1872.

*LYALL v. LYALL.

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[1860 L. 115.]

Succession Duty — Foreign Domicile — Settlement — Residuary Estate.

By a marriage settlement executed in England, the husband assigned to trustees (all domiciled and resident in England) an English policy of assurance, effected on his own life for £2,000, payable at the expiration of six months after his death and a sum of £1,047 8s. 8d. consols, and covenanted to pay to the trustees within three years a sum of £1,000; and it was declared that the policy moneys and the £1,000 should be held upon trusts for investment and payment of the income to the wife for life, and then to the husband for life, and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth, up to the time of his death, domiciled in New South Wales. The wife survived only three months, and left one child, the plaintiff, who was also domiciled abroad. At the time of the wife's death neither the policy moneys nor the £1,000 covenanted to be paid to the trustees of the settlement had been paid to them:

Held, on the authority of *Attorney-General v. Campbell* (1) that succession duty was payable by the plaintiff on the funds to which he became entitled under the settlement.

By his will, the husband appointed trustees and executors in New South [2] *Wales to collect his residuary estate (which was all locally situate in that country) and transmit the same to trustees and executors in England, who were to invest the funds so transmitted in government funds or real securities, and pay the income to his wife for her life, and after her death to divide the same among the children. At the time of the wife's death, no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them:

Held, that no succession duty was payable by the plaintiff on the funds to which he became entitled under the will.

In May, 1850, John Campbell Lyall, of Sydney, in New South Wales, intermarried with Octavia Sophia Nunn, of Colchester,

(1) Law Rep., 5 H. L., 534.

in the county of Essex. The marriage was solemnized in England. Previous to the marriage a settlement was executed by and between John Campbell Lyall, of the first part, his intended wife, of the second part, and the defendants William Lyall, Thomas Shutt Atkins, and Roger Sherly Nunn (all resident in England), trustees of the settlement of the third part. The settlement recited that the husband had insured his life with an English life assurance company for £2000 (payable at the expiration of six months after his death), and had invested £1000 in the purchase of £1047 3s. 8d. consols, in the name of the trustees; and in consideration of the marriage, the husband thereby assigned the policy to the trustees, and covenanted to pay to them, within three years from the date of the settlement, the further sum of £1000; and it was thereby declared that the proceeds of the said policy and the said sum of £1047 3s. 8d. consols, and also the sum of £1000 covenanted to be paid as aforesaid, should be held by the said trustees in trust to invest the same in government stocks or real securities, or such other securities as therein mentioned, in trust to pay the income thereof to the wife for her life, for her separate use, and after her decease to the husband for his life, and after the decease of the survivor, in trust for the children of the marriage, as the husband and wife should jointly appoint, and, in default of such appointment, upon trust for all the children of the marriage, equally to be divided between and among them, if more than one, share and share alike as tenants in common, and in case there should be but one child, then upon trust for such only child; the shares of sons to be vested at twenty-one, and to be assigned or transferred to them at the same age, unless the same should happen 3] in the lifetime of the *husband and wife, and then immediately after the decease of the survivor of the husband and wife.

In August, 1850, John Campbell Lyall made his will, and thereby appointed John Brown and William Brown, both of Sydney, in New South Wales, executors and trustees of his will, for the purposes of collecting, getting in, converting into money, and remitting to his executors and trustees in England, all and singular his estate, property, and moneys at Sydney. The testator then proceeded to bequeath all and singular his estate, property, moneys, and effects at Sydney to the said John and William Brown, upon trusts, to sell such portion thereof as should be salable and should not consist of money, and to collect and get in all moneys due to him; and to remit the proceeds to England to his executors and trustees thereafter named for carrying into effect his will in England. And the testator then appointed William Lyall, and his son William Andrew Lyall, executors and trustees of his will in England,

for the purpose of collecting and getting in all his assets and estates in England, and for receiving all the property and moneys which should be transmitted or remitted from Sydney, and for the general purpose of carrying his will into effect. And the testator directed his last mentioned executors and trustees to invest all his moneys on government funds or real securities at interest, and to pay the income to his wife during her widowhood for the support of herself and her children; and after her death upon trust to transfer, pay, and divide the the same unto and among his children in equal shares and proportions, and to be vested in sons on attaining twenty-one, and in daughters on attaining that age, or marrying. The testator died at Sydney, in New South Wales, on the 24th of April, 1853. He was at the time of the settlement executed on his marriage, and thenceforth until his death, domiciled at Sydney, and all the estate and effects to which he was entitled at the time of his death were situated there. His widow survived him three months, and died on the 20th of July, 1853, leaving Roger Andrew Lyall, the plaintiff in this suit and the only child of the marriage, her surviving. The plaintiff was born in Sydney, and was by domicile of birth a foreigner, and such domicile had not been changed. At the time of Mrs. Lyall's death none of the moneys or *property subject to the settle- [4 ment, except the £1047 consols, had come to the hands of the trustees thereof, and no part of the testator's estate had been remitted to England.

In 1860 the plaintiff, by his next friend, instituted a suit in this court for execution of the trusts of the settlement and administration of the testator's estate. Under the decree and orders made in the cause, the £1047 8s. 8d. consols, and the proceeds of the investment of the £2000 secured by the policy of assurance (making together the sum of £4277 2s. 11d. consols), were transferred into court to "the settlement account," and the £1000, covenanted to be paid by the settlor to the trustees of the settlement at the end of three years, was made good out of the estate of the testator and invested in consols, which were afterwards transferred to the same account. The residuary estate of the testator was also invested, in consols, and the investment was transferred into court to "the will account," and a sum of upwards of £18,000 consols was standing to the credit of the last-mentioned account.

The plaintiff, having attained the age of twenty-one, now petitioned for transfer to himself of the funds in court. It was admitted that succession duty was payable on the £1047 8s. 8d. consols, but the crown claimed duty on the other funds stand-

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ing to the settlement account, and also on the funds standing to the will account.

Sir *R. Baggallay*, Q.C., and Mr. *Hemming*, for the petitioner: The plaintiff's title to the funds accrued in July, 1853. At that time there were no funds in England subject to the trusts of the settlement or the will. The policy moneys were not payable until six months after the death of the insured, and had not been paid; and no part of the testator's estate had been remitted to England, either for the purpose of fulfilling the contract in the settlement, or upon the trusts of the will. The case is governed by *Wallace v. Attorney-General* ⁽¹⁾, where it was laid down that the residuary estate of a testator domiciled abroad is not subject to succession duty. *Attorney-General v. Campbell* ⁽²⁾ the question was whether a particular fund formed part of the residue or had been severed therefrom: the house of lords held [5] that it had been severed, and *had become an English trust fund, and therefore that duty was payable; but in the present case there had been no severance, and the fund was not in England when the plaintiff's title accrued.

Mr. *E. G. White*, for the Executors of the tenant for life.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *W. W. Karlake*, for the crown: First, as regards the policy moneys. The policy was with an English assurance company, and was assigned to English trustees. It has been decided that money due on a policy is property within the meaning of the Stamp Acts; it was property in England, for both the debtor and creditor were resident there; and the fact that the debt had not been paid at the date of the succession is wholly immaterial. Next, as regards the £1000 covenanted to be paid to the trustees of the settlement. This was a debt due from the testator to English creditors; it had therefore, in the eye of the law, a locality in England, the domicile of the creditors: *Story's Conflict of Laws*, s. 399. It was subject to the jurisdiction of English courts, and is liable to succession duty according to the principles laid down in *Attorney-General v. Campbell* ⁽²⁾. It was money payable under an "engagement," within sect. 1 of the Succession Duty Act. Then as to the residuary estate. The testator directed that to be transmitted to this country, and invested and administered here. It is, therefore subject to succession duty, according to the case last cited. If a testator dies here, having debts due to him in Australia, the executors may be sued for probate and legacy duty, and it is no answer to say that the property is not in this country. So here, it is no answer to say that the property was not in this country when the succession accrued.

⁽¹⁾ Law Rep., 1 Ch., 1.

⁽²⁾ Law Rep., 5 H. L., 524.

The English trustees and executors had the right to compel the Australian executors to pay to them; that created an obligation on the part of the Australian executors in the nature of a debt to the English trustees — a debt payable in England to persons domiciled there; and therefore, in the eye of the law, having a locality in England. It is true that the Australian executors were entitled to a reasonable time to transmit *the property [6 to England, but the only effect of that would be to entitle the English executors to a reasonable time to pay the duty. The case of *Attorney General v. Brunning* (1) shows that for fiscal purposes the time at which the property is transmitted to England is immaterial.

In the judgment of Lord Cranworth, in *Wallace v. Attorney General* (2), there are *dicta* inconsistent with this line of reasoning; but these *dicta* were dissented from by the house of lords in *Attorney General v. Campbell* (3), though the decision itself was approved of. If a person domiciled in Paris gives a legacy to a Parisian, the mere circumstance that the legacy consists of a sum of consols does not render it liable to legacy or succession duty; but a legacy payable to an Englishman is property in England, and liable to succession duty. Here the residuary estate of the testator was payable to English trustees, who were to hold it upon trust for the testator's widow for life, and then for the plaintiff; by the widow's death a succession accrued, on which duty is payable.

Sir *R. Baggalley*, in reply: If a Frenchman gives a legacy of consols to a Frenchman, succession duty is not payable thereon: *Wallace v. Attorney General*; but if the Frenchman directs his executors to set apart a fund of consols and pay the income to A for life, and then transfer the fund to B, succession duty is payable, according to *Attorney General v. Campbell*. Between them, these two cases show that two things are necessary in order to entitle the crown to succession duty: 1, a settlement; 2, the appropriation of a fund in England upon the trusts of the settlement. Here there was a settlement, but no appropriation of property in England at the time when the alleged succession accrued; the claim to duty therefore fails. As to the fund representing the policy moneys, the testator's estate was the creditor, not the trustees of the settlement; if, therefore, the locality of the debt is regulated by the domicile of the creditor, the debt must be treated as being foreign property. Moreover, *the policy money was not payable until a date subsequent to the death of the widow, and therefore to the date of the alleged succession. Then as to the £1000 covenanted to be

(1) 8 H. L. C., 243.

(2) Law Rep., 1 Ch., 1.

(3) Law Rep., 5 H. L., 524.

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paid to the trustees of the settlement, the testator did not live long enough to entitle the trustees to sue him. [He referred to *Thomson v. Advocate General* (').]

Nov. 4. LORD ROMILLY, M.R. : This is a petition for the payment out of a fund in court, on which the commissioners of inland revenue claim succession duty. It raises an important question on the construction of the Succession Duty Act, which has been much discussed in the Court of Chancery and the house of lords, and which, as far as I can judge, from examining the cases and the observations of the judges in deciding them, has been the subject of some conflict of opinion. The facts are these. [His lordship stated them, and continued :] Succession duty is claimed on the three sums constituting the settlement fund. The liability to pay succession duty on the £1047 3s. 8d. consols invested at the date of the marriage, on the trusts of the settlement, is not disputed. The question arises on the money secured by the policy on the life of the settlor, and also on the sum of £1000 covenanted to be paid by him three years after the date of the settlement. Both these sums were payable for the first time after the death of the settlor. By the terms of the policy the money thereby secured was not payable till six months after the death of the settlor. The covenant to pay the £1000 was not enforceable till three years after the date of the settlement, and therefore no debt arose until the 22d of May, 1853, which was one month after the death of the settlor. On behalf of the petitioner it is contended that no succession duty can arise before the property is in existence which is to be settled ; that the trusts cannot arise until the property is in existence in the hands of the trustees who are to execute the trusts, 8] and that *this could not be, so far as related to the £1000 covenanted to be paid, till the Australian trustees remitted the £1000 to the settlement trustees ; and as regarded the policy of assurance, till the money thereby secured was paid to them by the insurance company. . On the other hand, for the commissioners of inland revenue, it is contended, as regards the £1000 covenanted to be paid, that the locality of a debt is where the creditor resides ; and that £1000 due by an Australian to an Englishman is English personal property, and consequently that the creditors were English trustees, and the money due to them by the testator was English property, to which, at the death of the survivor of the settlor and his wife, the petitioner succeeded under the trusts of the settlement ; and that the domicile of the petitioner does not affect the question ; and that if neither he nor the property had ever come to this country,

(') 12 Cl. & F., 1.

still the trustees would have been liable to pay the succession duty, and that they must recover it from the Australian executors, as part of the charges they were liable to pay for their testator out of his estate.

In answer to this, it is urged that by the case of *Thomson v. Advocate General* ⁽¹⁾, it is determined that the rule *Mobilia sequuntur personam* applies as regards the Legacy Duty Act, and consequently that in this case the property cannot under these acts be properly treated as English property. In answer to this, the commissioners contend that this rule is confined to the Legacy Duty Acts, and does not apply in the case of the Succession Duty Act.

The case principally relied upon for the commissioners of inland revenue is the case of the *Attorney General v. Campbell* ⁽²⁾, heard before the house of lords, in April of this year. The case so relied upon was to this effect: William Callanane, who was by birth an Irishman, but who had for many years resided and carried on business at Oporto, in the kingdom of Portugal, and who, for the purposes of that case, was taken to have acquired a Portuguese domicil, in the year 1853 came to London for medical advice, and died there on the 11th day of September, 1853. By his will, which was made in England a few days before his death, and was in the English form, he gave *the residue of [9] his estate (which chiefly consisted of the profits of his business carried on at Oporto) to four trustees, of whom three were Englishmen and resident in England, and the fourth was an Irish Roman Catholic priest resident at Oporto, upon trust for conversion, and with a direction to invest the proceeds of such conversion in the £3 per cent Consolidated Bank Annuities of Great Britain; and the trustees were directed (amongst other trusts) out of the income to pay an annuity to the testator's sister, Elizabeth Callanane, for her life. She died in 1870, when the annuity determined, and the funds which were set apart to meet the annuity under a direction to that effect in the will then fell into the residuary estate which the testator, by his will, disposed of on trusts in favor of his son and two daughters. It came originally before me ⁽³⁾ and I thought that the Succession Duty Act did not apply, because, in my opinion, the life annuity, which was the fund said to be settled, was merely a charge on the residue, and might have been satisfied without any investment by the purchase of an annuity for her life, and that whether the testator was a natural born subject or not, the duty payable on the residue and on the annuity would be legacy duty and not succession duty. I held

⁽¹⁾ 12 Cl. & F. 1.

⁽²⁾ Law Rep., 5 H. L., 524.

⁽³⁾ Law Rep., 11 Eq., 378, *sub. nom.* Callanane v. Campbell.

also that I was bound by the decision in the case of *Wallace v. Attorney General* ⁽¹⁾, and that the observations made by the Lord Chancellor Cranworth in deciding that case exactly covered the case then before me. The solicitor general, in argument before the house of lords, stated that the exact point had been decided the other way once by the Vice Chancellor Stuart and once by the Vice Chancellor Malins. the cases referred to are: *In re Smith's Trusts* ⁽²⁾ and *In re Badart's Trust* ⁽³⁾ [His lordship then stated briefly the effect of these cases, and of *In re Wallop's Trust* ⁽⁴⁾]. It will be observed that they none of them touch the point on which I principally relied in deciding that case, which was to this effect: that it was a case of legacy duty and not of succession duty, and that if in that case all the legatees had [10] been liable to legacy *duty the duty payable would have been under the Legacy Duty Act and not under the Succession Duty Act.

The case of *Attorney General v. Campbell* ⁽⁵⁾ was heard *ex parte*, no one appearing for the respondent; and though the point on which I mainly relied was only slightly alluded to by one of the counsel in the argument before the house of lords, and was not noticed in their lordships' judgment, yet the judgment they did pronounce does appear exactly to apply to the case now before me. In that case their lordships decided that when a person, whether an alien or a British subject, succeeds to property under a British settlement vested in British trustees, he is liable to pay succession duty, whether the settlement be made by an alien or a British subject, and whether the settlement be made by deed or will, and, as I understand, wherever the property is locally situated. As to the case of *Wallace v. Attorney General* ⁽¹⁾, they did not expressly overrule it, but they held that it did not apply to or affect the case before them, as it was one of legacy duty, and the case before them was one of succession duty. This is unquestionably true, if, as they assumed, the case then before them was a case of succession duty, but not if, as I thought, the case before them was one of legacy duty. The case, however, in any view of the case, was materially affected by the *dicta* of the Lord Chancellor Cranworth. Of course the question in the case now before me is one on the construction of the Succession Duty Act, and has nothing to do with the Legacy Duty Acts; and on this point their lordships thought the case of the *Attorney General v. Campbell* so clear, that assuming that the point which was argued, and on which they decided, was the only point which arose in the case, although no argument was

⁽¹⁾ Law Rep., 1 Ch., 1.

⁽²⁾ Law Rep., 10 Eq., 588.

⁽³⁾ 12 W. R., 983.

⁽⁴⁾ 1 D. J. & S., 658.

⁽⁵⁾ Law Rep., 5 H. L., 524.

adduced for the respondents, they thought it useless to ask for the assistance of any of the common law judges. It is unquestionable that I am bound by this decision of the house of lords; still, I cannot but remark that the question seems to me to be left in an unsatisfactory position. It is quite settled that the words of the Legacy Duty Act do not include the case of an alien disposing by will of property situate in this country. The words of that act are these: "Every legacy given by any will or testamentary instrument of any person." Upon these words the house of lords, consisting of Lords Lyndhurst, Brougham, and Campbell, decided in the case of *Thomson v. Advocate General* (*), that the will and legacy of a foreigner was not a will and legacy within the meaning of the statute of 36 Geo. 3, and that consequently legacy duty was not payable, and that the personal property, wherever situate, followed the domicile of the testator. They decided this after summoning the judges who gave their unanimous opinion after hearing a long argument before them on both sides.

The words of the Succession Duty Act are just as large. By the interpretation clause, "property" means every species of property, and the act applies to everybody. The 2d section is this: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition a 'succession.'") The question here is whether this is a settlement and a succession within the meaning of the act. The words, as I have observed, are equally large in both cases. I think, to use the words of Lord Chief Justice Tindal, that these words must admit of some limitation in their application, "for they cannot in reason extend to every person everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death domiciled within the realm or abroad." It may be admitted that there is this distinction between legacy and settlement: that if a foreigner think fit to settle property locally situate in England according to English laws it must be subject to all English laws, including that which relates to succession duty, and that in this respect the Succession Duty Act must be more extensive than the Legacy Duty Act; but it is difficult to see how that can apply to a foreigner who includes in an English settlement not only property locally situate in England, but also property locally situated abroad, and settled for the enjoyment in succession of other foreigners.

(*) 12 Cl. & F., 1.

The observations made by Lord Cranworth, in *Wallace v. Attorney General* ⁽¹⁾ bear strongly on this part of the case. It is stated in argument, and this statement is adopted by the learned [2] lords in the *case of the *Attorney General v. Campbell* ⁽²⁾, that the case of *Wallace v. Attorney General* ⁽¹⁾ had no bearing on the question before them, because it was a case of legacy duty and not of succession duty; but at the same time another case was heard with it, *Jeves v. Shadwell*. If the statement so made by the solicitor general and adopted by their lordships was correct, everybody concerned in the case of *Wallace v. Attorney General* itself fell into an error. It was supposed by the law officers of the crown who argued the case to be a case of succession duty, and they so treated and argued it; it is so entitled by the reporter who reported it. As a question of legacy duty it was not argued; it is cited by the marginal note as succession duty, and it was decided by the lord chancellor as a case of succession duty; and though the facts of the case of *Wallace* do not appear to be other than legacy duty, yet the case of *Jeves v. Shadwell* was clearly one of succession duty if the case of *Attorney General v. Campbell* be one; for by it the claimant succeeded as legatee of the testatrix to property settled on her by a previous testator, and accordingly it was argued as such and decided as such. The decisions before Lord Justice Turner were cited, particularly *In re Wallop's Trusts* ⁽³⁾. The lord chancellor, in delivering judgment, after referring to *Thomson v. Advocate General* ⁽⁴⁾, used these words ⁽⁵⁾: "I can hardly think that the legislature intended, by a sidewind, as it were, and without any preamble indicating its intention, to do what, without exciting attention, would practically operate as a reversal of that which, after frequent discussions in the different courts, had established the rights of persons claiming as legatees under foreign wills." He concludes with this observation: "parliament has no doubt the power of taxing the succession of foreigners to their personal property in this country, but I can hardly think we ought to presume such an intention unless it is clearly stated."

It was on such grounds as these that the decision of the house of lords in *Thomson v. Advocate General* was based. And it is to be observed that the leading ground for that decision was not any distinction now taken between legacy duty and succession [13] duty, *which latter impost no doubt did not then exist, but it was a ground which applied to all property, wherever locally situated; for if the property was English property, but was

⁽¹⁾ Law Rep., 1 Ch., 1.

⁽²⁾ 1 D. J. & S., 656.

⁽³⁾ Law Rep., 5 H. L., 524.

⁽⁴⁾ 12 Cl. & F., 1.

⁽⁵⁾ Law Rep., 1 Ch., 9.

given by will by a foreigner to a foreigner, it was held liable to pay no duty, nor did it depend on any distinction that it was or that it was not administered by an English court of justice, but on the ground that the words of the clause could not have universal application, and must rather, as I understand it, be limited by the comity with which one nation regards another, to the effect that the inhabitants of a foreign country are not to be taxed on conferring on another foreigner or for receiving from him a gift, because the property happens to be locally here, unless the words imposing such tax are distinct and unequivocal. This is the right expressly noticed and affirmed in the act for the creation of consols, which expressly exempts all foreigners from any tax. And yet the decision in *Attorney General v. Campbell* ⁽¹⁾ seems to me to lead in practice to an opposite conclusion. The result of the distinction now acted upon is this : if an alien on his marriage invest £1000 in consols in trust for himself for life, and afterwards as he shall by will appoint, and in default of appointment to his son absolutely, and he dies having left this £1000 to A. B. by will, A. B. would not have to pay legacy duty ; at least so I read the case of *Thomson v. Advocate General* ⁽²⁾ ; but if the alien dies intestate, then the son would have to pay succession duty on the £1000 ; at least so I read *Attorney General v. Campbell*. All the arguments and observations of Lord Cranworth appear to me to apply with equal force to succession duty as they do to legacy duty. Nor does it appear to me that the case now before me was before the Lord Justice Turner when he made the observations in the case of *In re Lovelace's Settlement* ⁽³⁾, which are now so much relied upon. In that case, it is to be observed, that the property was locally situated in England, and that it is on this fact that Lord Justice Turner mainly relies, but I do not see how that can apply to the case where a foreigner settles property locally situate abroad, because he likes the protection which English courts give to the *persons who are the objects of the settlement. This [14 ground of administration is expressly excluded in the judgment of Lord Chief Justice Tindal in *Thomson v. Advocate General* ⁽²⁾. It is difficult to see how this can be a settlement of English property under one statute and not so under the other statute ; and if so, how can the settlement by a foreigner of foreign property be a settlement within the meaning of this act ? But according to the argument, if a French gentleman, residing in Paris, marries an English lady, and makes an English settlement, by which French rentes are settled on himself for life, remainder to her for life, and after the death of the survivor to the children of

⁽¹⁾ Law Rep., 5 H. L., 524.

⁽²⁾ 12 Cl. & F., 1.

⁽³⁾ 4 De G. & J., 340.

the marriage, and that one of the two trustees named is an Englishman and happens to be the survivor, that trustee must be compelled to pay succession duty for the wife and children on the French rentes because of a rule that property is situated where the creditor resides, though locally situated abroad, and notwithstanding the rule in *Thomson v. Advocate General*, which, as applied to the Legacy Duty Act, holds that the personal property, wherever situated, *sequitur personam*. It is also clear, I think, that in that decision (*Thomson v. Advocate General*) the beneficial owner was the person meant to be designated, and not the trustee, who is by fiction of English law the nominal creditor, and who is here introduced in order to obtain the application of the rule stated to exist in Story's Conflict of Laws, but so stated with reference to a wholly different matter, for the purpose of interpreting in favor of the crown the clauses relied upon. I confess that it did somewhat surprise me to hear a technical rule of this description strained to apply to the case of a debt due from a foreigner to English trustees in trust for a foreigner. The case, of course, becomes stronger when it is reflected that the tax is one on consols not existing at the date of the settlement, but to be bought in the execution of its trusts, and which, when belonging to a foreigner, the English legislature has declared shall not be subject to any duty, then or thereafter. And here it must be borne in mind that the beneficial owner was at the date of the settlement and of the death of the settlor and of the first tenant for life, a foreigner, and that the orders of the Court of Chancery have all been relating to the property of a foreigner.

[5] *In conclusion, I must state that it appears to me that the distinction drawn between the two statutes is extremely thin, and that the arguments against legacy duty, as stated in *Thomson v. Advocate General* ⁽¹⁾, apply with equal force to the words of this statute, as regards, at all events, property locally situated abroad, and it is to be remembered that that case was not heard *ex parte*, but was twice argued before the house of lords; and that it was not only the opinion of that tribunal, consisting of Lords Lyndhurst, Brougham, and Campbell, but it was so after taking the opinion of Chief Justice Tindal and seven other judges, who were summoned on the occasion, and who were unanimous in their opinion, after hearing the full argument on both sides. As, however, the decision of the house of lords in the case of the *Attorney General v. Campbell* ⁽²⁾ was unqualified and decisive, and as it clearly appears to me to govern every case of a settlement made in English form, and, consequently, to govern the case before me, I have no option but to follow it,

(1) 12 Cl. & F., 1.

(2) Law Rep., 5 H. L., 524.

and accordingly I shall make an order to the effect that, the court being of opinion that, according to the decision in *Attorney General v. Campbell*, succession is payable in this case, order the same to be paid, and order the residue of the fund to be paid to the petitioner.

Sir *R. Baggallay*: Does your lordship's decision extend to the funds which are subject to the trusts of the will?

THE MASTER OF THE ROLLS: No. I hold that no duty is payable on those funds which constitute the residuary estate of the testator.

Solicitors: Mr. *R. Wiltshire*; *The Solicitor of Inland Revenue*.

[Law Reports, 15 Equity, 16]

M. R. Nov. 19, 20, 1872.

*In re SPENSLEY'S ESTATE. SPENSLEY v. HARRISON. [16

[1870 S. 29.]

Administration — Mortgagee's Suit — Sale — Priority of Costs.

In an administration suit by a mortgagee who has obtained an order for sale of the real and leasehold estate for payment of his debt, the personal representatives of the testator are entitled, in case of deficiency of assets, to their own costs, charges and expenses, in priority to the plaintiff's costs of the sale.

THE plaintiff, who was a creditor of a deceased testator, and mortgagee of the whole of his real and leasehold estate, took out a summons for the administration of his real and personal estate, under which he obtained an order for the sale of the real and leasehold estate. The order was in the usual form, and did not provide for adding the plaintiff's costs to his debt. The defendants were the executors. The estate had been sold, and the plaintiff's debt paid out of the proceeds of the sale; but the balance was insufficient for payment of the plaintiff's costs of the sale and the costs, charges, and expenses of the executors. The case now came on for further consideration, and the question was, whether the plaintiff's costs of the sale should have priority over the executors' costs, charges, and expenses, the assets being insufficient.

Mr. *Fry*, Q.C., and Mr. *Cecil Dale*, for the plaintiff, contended that the plaintiff's costs of the sale must be paid first. They cited *Berry v. Hebblethwaite* ⁽¹⁾ and *Tuckley v. Thompson* ⁽²⁾.

Mr. *Rigby*, for the defendants: The executors are entitled to their costs, charges, and expenses in priority to the plaintiff's costs. Thus, in *Wetenhall v. Dennis* ⁽³⁾, in an administration suit by a legatee, it was held that, in case of deficiency of assets,

(1) 4 K. & J., 80.

(2) 1 J. & H., 126.

(3) 33 Beav., 285.

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[7] the costs were payable in the following order: *first, the costs of the personal representative as between solicitor and client; and, secondly, the costs and expenses of the plaintiff in selling and getting in the estate. The same rule is applicable to a suit by a mortgagee. [He referred also to *Tipping v. Power* (1).]

Nov. 20. LORD ROMILLY, M.R.: I shall follow the rule laid down in *Wetenhall v. Dennis* (2). It is, I think, clearly settled, that where the assets are insufficient, the executor is entitled in the first place to his costs, charges, and expenses; and that afterwards the plaintiff is entitled to his costs of the sale.

Solicitors: Messrs. *Newman, & Dale, & Stretton*; Messrs. *Cole, Cole, & Jackson*.

[Law Reports, 15 Equity, 18.]

V. C. M. Nov. 9, 1872.

[8] *In re IMPERIAL LAND COMPANY OF MARSEILLES. WALL'S CASE.

Application for Shares — Letter of Allotment by Post — Denial of receipt of Letter — Completion of Contract.

An applicant for shares in a company denied that he had received the letter of allotment, which was posted in London on the 16th of March, and should have arrived on the 17th; and, having written on the 17th recalling his application, applied to have his name removed from the list of contributories:

Held, that the unsupported evidence of the applicant was not sufficient to prove that the letter of allotment which was posted had not been received, and that the name must therefore be retained upon the list. The court expressed an opinion that if the letter of allotment had not been received the contract to take shares would still have been binding upon the applicant as soon as the letter was posted.

British and American Telegraph Company v. Colson (3) disapproved of.

THIS was an application upon adjourned summons by Mr. Thomas Wall, a draper, residing at Kilkenny, that his name might be removed from the list of contributories in the Imperial Land Company of Marseilles, Limited, in respect of fifty shares allotted to him by the company. Mr. Wall applied by letter on the 6th of March, 1866, for fifty shares in the company. The application was made upon the usual printed form, and was accompanied by payment of £50, being a deposit of £1 per share. On the 14th of March, while in the city of Manchester, Mr. Wall heard a very bad report of the position of the company, and then determined upon withdrawing his application. He did not, however, carry out his intention till the 17th of the month, upon his return to Kilkenny. On that day

(1) 1 Hare, 405.

(2) 33 Beav., 285.

(3) Law Rep., 6 Ex., 108.

he wrote to the company withdrawing his application for shares, and stating that under no circumstances would he become a shareholder in the company should they allot him any number of shares; he also applied for a return of the £50 deposit. The shares in the company were allotted on the 15th of March, and there was evidence to prove that the letters of allotment, *including a letter allotting to Mr. Wall fifty shares in the [19 company, were posted in London on the 16th of March, and would in the ordinary course of post have been delivered in Kilkenny on the 17th, the day on which Mr. Wall posted his letter withdrawing his application. Mr. Wall denied by affidavit that he had ever received any letter of allotment from the company. He, however, made no further demand for repayment of the deposit.

Mr. Cotton, Q.C., and Mr. H. M. Williams, for Mr. Wall: In order to constitute a contract to take shares in a company there must be an application for the shares, and there must be an allotment and a communication of the allotment to the applicant; and it is not sufficient that the letter should have been posted to the applicant informing him of the allotment, but it must also be received by him. This was settled by the case of the *British and American Telegraph Company v. Colson* ⁽¹⁾, which decides that although the letter may have been posted to the applicant, yet if, in consequence of a confusion in the numbers in the street, or from any other cause not attributable to the applicant, the letter does not reach him, he is to be considered as if it had never been sent to him at all. That decision was approved of by your honor in *Townsend's Case* ⁽²⁾. There is no case which has decided that a man is to be considered in the same position as if he had received the letter, where the non-receipt of it is not attributable to his own fault. In the case in the Exchequer Chief Baron Kelly said that the party who proposed a contract was not bound by the acceptance of it until the letter of acceptance was delivered to him or otherwise brought to his knowledge, except where the non-receipt of the acceptance was occasioned by his own act or default; and he expressed his opinion that if the law were otherwise it would work great and obvious injustice in a variety of mercantile transactions of frequent occurrence. So in *Reidpath's Case* ⁽³⁾, where the applicant denied that he had ever received the letter of allotment, the master of the rolls said, "There are three things which constitute the contract, the application for shares, the allotment of *shares, and the notice of the allotment. . . . [20 Who ought to prove the notice of the allotment? I apprehend

(1) Law Rep., 6 Ex., 103.

(2) Law Rep., 11 Eq., 86, 80.

(3) Law Rep., 13 Eq., 148.

the company ought to prove that. Does the fact of putting the notice in the post office sufficiently prove it? I find no case which has laid down that rule." His lordship there refused to admit the proof in opposition to the positive oath of the applicant, who denied having ever received the letter.

In this case there is the positive denial of Mr. Wall that he ever received the letter, and it is not sufficient for the company to prove that the letter was posted with a great number of other letters on a particular day. Mr. Wall's name ought therefore to be removed from the list of contributories.

Mr. Glasse, Q.C., and Mr. Higgins, Q.C., for the official liquidator.

The only proof of the non-delivery of the letter of allotment is the unsupported evidence of Mr. Wall himself, and there are many circumstances to throw a doubt upon the validity of that evidence. There is the fact, that it was on the 14th he heard reports which induced him to doubt the stability and honesty of the company, and yet it was not till the 17th that he wrote to withdraw his application for shares. It was probably not till after the delivery of the letters on the 17th that he posted his letter of withdrawal. Then the fact that he did not take steps to enforce a return of the deposit is a material circumstance, for it cannot be supposed that the loss of £50 was perfectly immaterial to a business man. There are also discrepancies in the statement of Mr. Wall which would, at any rate lead the court to hesitate before it trusted implicitly to his evidence. But even if the letter was not received, we submit that the allotment was still valid, and that Mr. Wall is bound by it from the time the letter was consigned to the post. There can be no doubt upon the authorities that the acceptance of a contract is complete from the time the letter containing the acceptance of an offer is posted. This was held in the case of *Potter v. Saunders* (1), and in *Dunlop v. Higgins* (2) it was decided that the posting of a letter accepting an offer constituted a binding contract from the time when the letter was posted. If, then, a contract is binding as soon as the letter is posted, how can the contract become of no effect because the letter is not delivered? 21] It would be quite as unjust to the person accepting the contract, if it were held that the person offering it were not bound, as it would be to hold the reverse; and mercantile transactions would be materially affected by such a state of the law. It is true that in *British and American Telegraph Company v. Colson* (3) the Court of Exchequer decided that the non-recognition of a letter of allotment was sufficient to hinder the allotment from being binding, but the correctness of this decision was

(1) 6 Hare, 1.

(2) 1 H. L. C., 331

(3) Law Rep., 6 Ex., 108.

questioned in *Harris' Case* ⁽¹⁾. Lord Justice Mellish said he always understood the law to be the other way until that case, which had caused some doubt on the subject. In *Dunlop v. Higgins*, Lord Chancellor Cottenham said that, in the case of a bill of exchange, notice of dishonor given by putting a letter into the post at the right time had been held quite sufficient, whether that letter was delivered or not; and he referred to *Stocken v. Collin* ⁽²⁾ as an authority on that point, and was of opinion that the rule as to accepting a contract was exactly the same as sending notice of dishonor of a bill of exchange. *Duncan v. Topham* ⁽³⁾ is also a decision to the same effect.

Mr. Cotton, in reply.

SIR R. MALINS, V.C.: This case certainly seems to raise a question of great importance. There are, in fact, two questions, and they arise in this way: the present applicant, Thomas Wall, is described as a merchant and draper in a large way of business in the town of Kilkenny. He admits that on the 6th of March, 1866, attracted as numerous persons were by the advertisements of this company, he applied by letter, in the usual form of application, for fifty shares, accompanied by £50, being a deposit of £1 per share, and requested the allotment to be made to him. It may be true that the application for the allotment does not say, "You are to send me the acceptance of the offer by post," but his offer was made by post, and he knew perfectly well that it was the regular settled mode of conducting such business, to send the letter of allotment by post. It is, therefore, as plainly an authority for the company to accept the offer by sending him a letter of allotment by post as if he had said, in express words, "The letter of allotment you send [22 to me by post shall be binding on me." It is not necessary to go very minutely into the evidence. It is well known that the process of allotment here was by a committee of directors who made the allotment on the 15th of March, and thereupon it was necessary to send out the letters of allotment. In carrying out that task it became the duty of particular clerks, who were employed for the purpose, to direct the letters of allotment and post them. Now there is the most distinct evidence that, in the ordinary course of business, amongst thousands of others, there was a letter of allotment for fifty shares, in pursuance of Mr. Wall's application, sent to him by the post on the 16th of March, 1866. After the decision in *Townsend's Case* ⁽⁴⁾ and *Harris' Case* ⁽¹⁾, there could be no question as to the fact of his being an allottee if that letter had been received. The ordinary course of post would take it to him at Kilkenny on the 17th. On the

⁽¹⁾ Law Rep., 7 Ch., 587.

⁽²⁾ 7 M. & W., 515.

⁽³⁾ 8 C. B., 235.

⁽⁴⁾ Law Rep., 13 Eq., 148.

17th he writes a letter, as Mr. Harris did on the 16th, recalling his application. Mr. Harris's letter I held to be too late. Mr. Wall does not write from Kilkenny till the 17th, therefore there is no doubt in my mind that that was too late. But then he says, "I never received the letter of allotment." Now there are two questions arising — first, did he receive the letter of allotment? If he did, there is an end of all question; if he did not receive the letter, then arises a question, and a most important one, upon which the law is left in a state of doubt and difficulty, namely, whether an offer accepted by letter which is duly posted is binding, although there may have been some miscarriage in the post — whether from the breaking down of a railway train, or the carriage containing the letters taking fire and the letters all being consumed, or the mail packet which carries them foundering at sea, or if from any other cause the letter containing the acceptance of the offer is not delivered — whether the contract can be considered at an end because the letter did not arrive at its destination? That is a question which does not arise in this case if I come to the conclusion that the letter of allotment was, in point of fact, received.

I may say, first of all, that I think there would be very considerable danger, where a letter is proved to have been duly posted 23] and *duly directed, in relying upon the unsupported statement of a person who, wishing to get rid of what he finds to be a burden, says that he never received it, and any such evidence, in my opinion, ought to be received with the greatest amount of caution. I hope it will be understood that I do not mean to intimate in any way that Mr. Wall, against whose respectability not a word has been suggested, intends to misrepresent willfully when he says that he did not receive the letter of allotment. But his own statement is this, that he was at Manchester on the 14th, that he there heard a very bad account of the state of this company, the directors being described as everything that was bad short of being murderers. One would have thought as a man of business, finding that he had made an application on the 6th to become a member of the company, and wishing to get out of it as quickly as possible, would not have left Manchester without writing a letter of recall; and if he had written from Manchester on the 14th, it would have been in time to prevent the allotment. Therefore his want of vigilance was such, as a mercantile man, that one cannot feel very much for him. But, having been in possession of this information, he goes back to Kilkenny, and arrives there on the 15th, and does not write to repudiate his offer till the 17th, and in the meantime the letter of allotment was sent, and I cannot entertain a doubt that the letter was duly posted on the 16th, because the

clerk swears it was, and it was in the ordinary course of duty that it should have been. I know no reason why the letter addressed to him should not have reached him when all the other letters appear to have reached their various destinations. There has been no question, in all the cases that we have had of this nature, that every letter that went away was duly received, except in *Townsend's Case* (¹), and that was because Mr. Townsend did not give the name of the town in which he lived. With that exception, I have never heard of any of the letters having miscarried. I must, therefore, come to the conclusion that the letter to him was undoubtedly posted in London on the 16th. He says he did not receive it. Now with respect to that, I find his mind in a state of confusion. He does not remember what he did or what it was he wrote; he says he made a copy of the letters, one was written in his own handwriting, and one in the handwriting of his son. I am much inclined to think, looking at the* writing, that he is mistaken even in [24. that. But at all events his mind seems to have been in such a state of confusion than I can attach very little importance to his statement about whether he did or did not receive the letter, and there being nothing but his unsupported statement that he did not receive it, I cannot place much reliance on that. If he had brought his clerk or his assistant, or any one to prove that when the post from London arrived on the 17th, there was no such letter as that, there might have been more importance attached to the evidence; but unless I am perfectly satisfied that I can implicitly rely upon the statement of a man in such a state of circumstances, I can only come to the conclusion that the letter must have been delivered, and, looking at all the evidence on both sides, I am of opinion that the letter was duly received. Then, coming to that conclusion, I must treat it as a jury would. If this had been an action, the learned judge in trying the matter would have drawn the attention of the jury to the facts, and would then have said to them, "Gentlemen, it is for you to draw your own conclusion from the evidence, and you will find whether, in your opinion, the defendant did or did not receive the letter of allotment." The jury, no doubt, would have done that which they did in the case of the *British and American Telegraph Company v. Colson* (²). In that case the court was relieved from any difficulty by the verdict of the jury. Therefore if this were a court of law I should be relieved from the difficulty, because the finding of the jury would have settled the question, and I think I am bound as a jury to come to the conclusion that the letter was received.

(¹) Law Rep., 13 Eq., 148.

(²) Law Rep., 6 Ex., 108.

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But it has been contended that, even if it was not received, that is perfectly immaterial. Now, upon that subject there seems to be considerable conflict of opinion. When *Townsend's Case* ⁽¹⁾ was before me, and the case of the *British and American Telegraph Company v. Colson* was cited, finding that the court there had decided the point that the letter was not binding unless received, I adopted that view. I thought there seemed to be considerable doubt, and I appear to have said, "It seems to be the law, and I think not unreasonably." But I have thought more of it since then, and my attention has been drawn 25] to what the lords justices *said in *Harris's Case* ⁽²⁾, who, although they did not overrule the decision of the Court of Exchequer, may be very fairly said to have thrown cold water upon it, for neither of the lords justices expressed any approbation of it; and, although I did say in *Townsend's Case* ⁽¹⁾, "It seems to be settled, and not unreasonably," upon further consideration I do not think it is so reasonably settled. In the course of the argument I put a case of this kind: Suppose A receives a letter containing an offer or a proposal, the sender of the letter saying, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A has done all that the person making the offer requests. There is no default on his part. The letter in its transit is lost or destroyed, why should the man who sends the letter be the only person to suffer? Why should not the man who has in effect admitted that if an answer be sent by return of post it should be binding on him, be the sufferer? Why should he not be put in the same position as if the letter had been actually received? There is some difficulty in it, and if it depended on that, my opinion is that I should come to the conclusion that an offer made by a letter requesting that the answer may be sent by post—it is not by return in this case, but in effect the application says, "whenever you make the allotment let me have it by post"—directly the letter is posted there is a binding contract. I decided in *Harris's Case* that in all cases of contract by letter, the acceptance of the offer by letter is binding the moment the letter is put into the post. Every one knows that the moment a letter is put in the post it becomes the property of the person to whom it is sent, and the person sending the letter has lost all control over it. So if A consigns goods to B, directly they are put on board ship they are the property of the consignee, and the consignor has no longer any control over them, except the right to stop *in transitu*, in the event of B's insolvency. Therefore I come to the conclusion, that the letter must be treated as having been received, and that conclusion is confirmed by this circumstance,

(1) Law Rep., 13 Eq., 148.

(2) Law Rep., 7 Ch., 587.

that though this gentleman, writing the letter on the 17th, demands the return of the deposit of £50, he seems to have had so little confidence in the position he assumed that he allowed three years to elapse without again demanding the £50. *He [26 may have thought, "Now they have allotted the shares to me, it is too late to repudiate them, I will keep quiet, and if they do not say anything to me, I will not say anything to them." Why did he not write and say, "Let me have my £50 back, and if you do not send it me, I will bring an action against you to recover it?" Therefore, in every view of the case, the only conclusion I can come to is, that this gentleman has not done enough to relieve himself from the consequence of his application, followed by the letter of allotment, and he must, consequently, remain on the list of contributories.

Mr. Glasse asked that Mr. Wall might be ordered to pay the costs.

THE VICE CHANCELLOR: I do not see how I can do otherwise. He has entered into the contest and has failed in it, and must therefore pay the costs in chambers and here also.

Solicitor for Mr. Wall: Mr. W. H. Bishop.

Solicitors for the Official Liquidator: Messrs. G. S. & H. Brandon.

Where one party, by letter, proposes a contract, and he to whom it is addressed responds by letter, accepting the proposal, the contract is complete and binding from the time of mailing the answer, if done before countermand. *Martin v. Frith*, 6 Wend., 103; *Vassar v. Camp*, 11 N. Y. Rep., 441, affirming 14 Barb., 341; *Underhill v. North Am., etc.*, 36 Barb., 364; *Dunlop v. Higgins* 1 House of Lords' Cas., 381; *Harris's Case*, 3 Eng. Rep., 529; *Bentley v. Columbia Ins. Co.*, 17 N. Y., 423-4; *Proprietors, etc. v. Ardrien*, L. R., 5 H. L., 61; *Matteson v. Scofield*, 27 Wisconsin, 671; *Myers v. Smith*, 48 Barb., 614; 5 Alb. Law Jour., 272; 7 Am. Law Rev., 433-456.

Although the sender may make it a condition that the proposal shall not be binding upon him until notice of its acceptance is received by him. *Vassar v. Camp*, 11 N. Y. Rep., 441; *Fellows v. Prentiss*, 3 Den., 520.

Or for a limited time only. *Britton v. Phillips*, 24 How. Prac. Rep., 111. And the proposal made be such as to show that an acceptance is not to be made until after examination by the proposer. *Myers v. Smith*, 48 Barb., 614.

The legal presumption is that the will

of the party sending the proposal continues until the letter reaches the party to whom it is directed. *Martin v. Frith*, 6 Wend., 103.

The answer, however, must be mailed within a reasonable time. *Taylor v. Rennie*, 35 Barb., 272; 22 How. Prac., 101.

It need not be sent by very next post. It has been held sufficient to deposit the answer any time on the day of receiving the proposal. *Dunlop v. Higgins*, 1 House of Lords' Cases, 381.

The acceptance must be in the terms of the proposal, and not a variation therefrom. *Honeyman v. Marryatt*, 6 House of Lords' Cases 112, affirming 21 Beav., 14; *Myers v. Smith*, 48 Barb., 614.

Although words of qualification which do not vary the contract will not render the acceptance invalid. *Proprietors, etc. v. Ardrien*, L. R., 5 H. L., 64.

Nor will an acceptance with a proposal for variation not made a condition. *Matteson v. Scofield*, 27 Wisc., 671.

Although if an option is given to the person to whom the proposal is addressed, he may elect which he will accept. *Underhill v. North American, etc.*, 36 Barb., 354.

It seems that if the parties reside in

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the same place, an acceptance by mail is not sufficient. *Britton v. Phillips*, 24 How. Prac., 111.

When the contract is made by letters it cannot be varied although proof of subsequent waiver of some of its provisions is admissible. *Whitmore v. South Boston, etc.*, 1 Am. Law Reg., N. S., 403, 2 Allen (Mass.), 53.

The rule that the mailing of a letter of acceptance completes the contract does not apply to negotiations by telegraph; an acceptance sent by telegraph is not completed until delivered to the person to whom it is addressed. *Trevor v. Wood*, 26 How. Prac. Rep., 451; 41 Barb., 255.

A letter referring to a previous verbal proposition, stating its terms according

to the understanding of the writer, accepting them, and requiring the party addressed to acknowledge his acceptance in writing, does not constitute a contract but a proposition for a contract. *Hough v. Brown*, 19 N. Y. Rep., 111.

So where a letter is addressed to another, inquiring if he is the owner of certain real estate and the price thereof, to which he responds, stating the price at which he holds it, such response will not be construed as a proposition of sale. *Knight v. Cooley*, 34 Iowa, 218.

Showing that a letter was written and placed among other letters to be sent to the post office, is not sufficient evidence that it was in fact mailed. *Felous v. Prentiss*, 3 Den., 523.

[Law Reports, 15 Equity Cases, 26.]

V. C. M. Nov. 15, 1872.

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*In re RUSSELL'S POLICY TRUSTS.

Policy of Assurance—Incumbrancer—Bankruptcy of Assured—Priority by Notice—Death of Assured.

A policy effected by A on his life was mortgaged in 1860 without notice to the office. A became bankrupt in 1862, and in 1868 joined in a transfer of the mortgage to B, who had no notice of the bankruptcy. After the death of A, B's solicitor gave notice to the office that this and other policies were mortgaged, and that he acted for the mortgagees, not naming them. Subsequently notice of the bankruptcy was given to the office:

Held, that this was sufficient to give priority to B over the creditors in the bankruptcy of the assured.

Stuart v. Cockerell (*) followed.

In re Webb's Policy (*) not followed.

THIS was a petition for payment out of court of a sum of £539 2s. 8d., paid in by the Law Union Fire and Life Insurance 27] *Company, being the proceeds of a policy of assurance on the life of Samuel Russell, of Worksop, dated the 19th of May, 1860. The policy was effected to enable Russell to obtain security for a debt of £400 due from him, and by a deed of the 29th of May, 1860, was assigned to the creditor. The solicitor of Russell in this transaction was a Mr. John Whall, of Worksop, who was also a local agent of the insurance company. No notice of this incumbrance was given to the insurance office either by Whall or the creditor. In the year 1862 Russell was adjudicated bankrupt, and his bankruptcy was gazetted on the 1st of July, 1862, but no notice of the bankruptcy was given to the insurance office. By an indenture of the 23d of March,

(*) Law Rep., 8 Eq., 607.

(*) 15 W. R., 529.

1868, to which Russell was a party, the debt of £400 and the policy were transferred to the petitioner for value. The transferee of the debt gave no notice to the office. There were two other policies on Russell's life, as to which similar questions arose with regard to other debts. On the 9th of August, 1871, Russell died, and on the 14th of August, 1871, Mr. Whall sent to the secretary of the insurance society the following letter:

"I regret to have to inform you that Mr. Samuel Russell, junior, died recently, and was buried at Blyth in the afternoon of Friday, the 16th instant. The three policies on the life of the deceased were duly assigned, and I act for the mortgagees."

This letter was received by the office on the 15th of August.

On the 30th of October, 1871, the office received notice of the bankruptcy from a Mr. William Hine Haycock, solicitor to a creditor (there having been no assignee appointed under the bankruptcy):

"I understand that by reason of the death of Samuel Russell (formerly Samuel Russell the younger), that three policies of assurance for £500 pounds each, effected in your office, have become payable. I therefore beg to inform you that that gentleman was adjudicated bankrupt in 1862, and his bankruptcy gazetted on the 1st of July in that year, and that I am concerned for a creditor of the bankruptcy. *I would suggest that [28 you should at once forward this letter to your solicitors, as the matter must ultimately come before them."

On the 6th of November, 1871, notice was given to the office of a claim by the administratrix of Russell.

Mr. Cotton, Q.C., and Mr. Smart, for the petitioner: An assignee under a bankruptcy has no priority over a particular assignee in respect to property the title to which requires perfecting by notice, or by stop order, or anything similar, unless the necessary steps are taken to perfect the title: *Stuart v. Cockerell* ⁽¹⁾. There is one case, *In re Webb's Policy* ⁽²⁾, decided a little before *Stuart v. Cockerell*, which may seem to be opposed to this view; but in that case the mortgagor had not concurred in any assignment subsequent in date to the bankruptcy, and the question of the applicability of the order and disposition clause might well be reargued. *In re Barr's Trusts* ⁽³⁾ was also a case in which the assignment was subsequent to the bankruptcy, and the decision was to the same effect as *Stuart v. Cockerell*. *Edwards v. Martin* ⁽⁴⁾ also shows that assignees in bankruptcy and particular assignees are on the same footing as regards giving notice.

⁽¹⁾ Law Rep., 8 Eq., 607.

⁽²⁾ 15 W. R., 529.

⁽³⁾ 4 K. & J., 219.

⁽⁴⁾ Law Rep., 1 Eq., 121.

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Mr. R. Swan, for the registrar in bankruptcy, who, in the absence of a creditor's assignee, represented the creditors :

In re Webb's Policy is exactly in point, and must be considered to govern an identical case, in preference to any mere deduction from *Stuart v. Cockerell*. The petitioner having been guilty of laches in not perfecting his title, cannot obtain priority by means of a notice given only after the death of the assured : *In re Rawbone's Trust* ⁽¹⁾. Moreover, so indefinite a notice as this is cannot be considered to give priority. The name of the incumbrancer ought at least to be given.

Mr. E. S. Ford, for the insurance company.

29] *Mr. G. A. Watson, for the administratrix, claimed the fund, but submitted that she was, at all events, entitled to her costs of appearance.

SIR R. MALINS, V.C., after stating the facts, continued : It is not attempted to be disputed that the petitioner had no notice of the bankruptcy. He, however, omitted to give notice to the insurance office at the time of taking the transfer, but afterwards, Russell having died, his solicitor, Mr. Whall, wrote as follows : [His honor then read the letter above set out, and continued :] That is clearly notice. It is said that notice, to be valid, must be made during the lifetime of the assured ; but that is immaterial, for the principle is, that notice is sufficient if it is given to the party having the fund whilst it remains in his possession. During the lifetime of Russell the fund was in his order and disposition, and if the notice had been given by the assignee under the bankruptcy, he would have obtained priority ; but the assignee also omitted to give notice. The question is not between the assignee in bankruptcy and a general assignee, but between him and an assignee of the particular thing ; and I can see no grounds for thinking that there is any difference between an assignee in bankruptcy and a particular assignee. The particular assignee loses priority by not giving notice, and the assignee in bankruptcy does the same thing. Russell, being bankrupt in 1862, was bound to know in 1868 that he had no interest in the policy. He committed a fraud by joining in the transfer, and the assignee in bankruptcy, by not giving notice, gave him power to commit the fraud. Exactly the same point occurred in *Stuart v. Cockerell* ⁽²⁾ ; and though it does seem that in *In re Webb's Policy* ⁽³⁾ I felt myself bound by previous authorities to decide in favor of the assignee in bankruptcy, I now adhere to my later decision in *Stuart v. Cockerell*, and hold that the petitioner will be entitled to prove for the full amount of his debt, and that, subject to his incumbrance, the assignees in

(1) 3 K. & J., 476.

(2) Law Rep., 8 Eq., 607.

(3) 15 W. R., 529.

bankruptcy will be entitled to the fund. For I cannot accede to the argument that the legal personal representative can take anything by reason of the omission of the assignee in bankruptcy *to give notice enabling the mortgagor to commit [30] a fraud by being party to an assignment of property in which he had no interest. The costs of all parties will be paid out of the fund, and the balance will be carried over. I think it is clear that the negotiation of the policy through the country agent of the insurance office was not sufficient to give the office notice.

Solicitors: Mr. W. H. Haycock; Mr. W. H. Tattam; Mr. George Burges.

[Law Reports, 15 Equity Cases, 30.]

V.C.M. Nov. 20, 1872.

BOOTH v. HUTCHINSON.

County Court Appeal—Set-off—Unliquidated Damages—Mutual Dealings—Bankruptcy Act, 1869, s. 39.

Under the Bankruptcy Act, 1869, the right of set-off is extended to unliquidated damages.

Where a person from whom rent is due to an estate in course of administration under the Bankruptcy Act, 1869, has a claim against the estate, he may set off his claim against all rent due down to the close of the bankruptcy.

THIS was an appeal from the County Court at Knaresborough. In the month of September, 1869, William Greetham entered into a verbal agreement to let a house at Harrogate to the respondent, Hiram Crompton Booth, from the 1st of October, 1869, to the 6th of April, 1870, for the rent of £17 10s., and from the 6th of April, 1870, thenceforward, at the rent of £80, payable half-yearly on the 6th of October and 6th of April. The house was then in an unfinished condition, and William Greetham also agreed that it should be completed in a proper and tenantable state before the 6th of April, 1870. On the 6th of April, 1870, the rent then due was not paid, and Greetham recovered it by distress, Booth paying the amount under protest, alleging that Greetham had failed to complete the house in accordance with the agreement.

*On the 11th of June, 1870, Greetham executed a deed [31] of assignment of all his real and personal estate to the defendants, Hutchinson and others, upon trust for the benefit of his creditors. The deed was expressed to be made between Greetham of the first part, and the trustees for themselves and the rest of the creditors of Greetham of the second part, and after assigning all the property to the trustees upon trust to sell and convert the same, and to pay the costs of preparing the deed, it continued

as follows: "And in the next place to pay, retain, and satisfy ratably and proportionably, and without any preference or priority to themselves, the said trustees and their partners, and the other persons parties hereto, who shall execute these presents within six calendar months from the date hereof, the several debts or sums set opposite to their respective names in the said schedule hereto, subject to the covenant hereinbefore contained for verifying the amount thereof." By a subsequent clause it was provided that all questions relating to the trust estate should be decided according to English bankruptcy law, and the last operative part was a release to Greetham by the creditors who should execute the deed of their respective debts, conditional on his having made a full disclosure of his estate. The rent due on the 6th of October, 1870, was not paid on that day; and on the 17th of December following a distress was levied for the sum of £40 at the instance of the trustees. On the 22d of December Booth replevied; and at the trial of the replevin suit on the 10th of February, 1871, at the County Court, judgment was given for the trustees for £40, less property tax, which sum was afterwards paid by Booth.

On the 18th of February following Booth filed a plaint against Greetham and the trustees to recover damages for non-completion of the house by the 6th of April, 1870. The plaint came on for trial on the 10th of March, 1871. The judge struck out the names of the trustees as defendants, and gave judgment against Greetham for £50 damages, and the costs of the suit. Before the 6th of April, 1871, a mortgagee recovered possession of the house by an action of ejectment.

On the 10th of July, 1871, a plaint in equity was filed in the 32] *County Court at Knaresborough for an administration of the trusts of the deed of assignment of the 11th of June, 1870, by Booth, who had not previously executed it, and a decree was made thereon on the 11th of August, 1871. On the 10th of November, 1871, the plaint came on for final hearing, and the order was made which was the subject of the present appeal. It declared as follows: "That the plaintiff is entitled to be repaid out of the fund in court the sum of £40, in preference to any claim on the part of the trustees, with interest thereon at 5 per cent from the time of payment, and it is ordered that the registrar do pay the same accordingly."

Mr. H. A. Giffard, for the appellants: There is no case of mutual credit here such as gives any right of set-off. Section 39 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which gives the right of set-off, is a continuation of the old mutual credit clauses in the previous Bankruptcy Acts, the wording being only varied by the addition in the last act of the words

"mutual dealings." Under the old law it was decided by a long, series of authorities, amongst which are *Simpson v. Burton* ⁽¹⁾ *Bell v. Carey* ⁽²⁾, *Rose v. Hart* ⁽³⁾, that there is no set-off in the case of unliquidated damages. *Rose v. Hart* has been always treated as a leading authority, and frequently cited with approval, even in cases as late as *Naorogi v. Chartered Bank of India* ⁽⁴⁾ and *Stanger v. Miller* ⁽⁵⁾. [Mr. W. Pearson, who appeared for the respondent, mentioned the case of *Makeham v. Crow* ⁽⁶⁾ as being a decision on the point.] That decision cannot be considered to settle the present question. It merely decided that a plea of set-off was *prima facie* good, leaving it to the plaintiff to demur to the plea if he thought proper. [The VICE CHANCELLOR: Is *Gibson v. Bell* ⁽⁷⁾ consistent with the undiminished authority of *Rose v. Hart* ?]

**Rose v. Hart* ⁽³⁾ was treated as a binding authority, as [33 late as 1868, in *Naorogi v. Chartered Bank of India* ⁽⁴⁾. But, assuming that, under the new law, the right of set-off exists in this case, its extent has to be considered. It ought, at least, to be limited to the rent due at the date of the deed, and not extended, as it is by the decision of the County Court, to rent accruing afterwards; for otherwise enormous sums might be set off for the supposed value of existing leases. The point has already arisen, and in *Ex parte Ryder* ⁽⁸⁾ it was decided that the date of a bankruptcy deed is the time to which mutual credit is allowed. Moreover, the form of the decree is inconsistent with the frame of the deed, which provides for an equal distribution of the estate amongst all the creditors: *Bailey v. Johnson* ⁽⁹⁾.

Mr. W. Pearson, for the respondent, was not called upon.

SIR R. MALINS, V.C., after stating the facts, continued: The question is, whether the respondent is bound to take a dividend only on the £50 recovered in his action, or can set it off against the £40 due from him for rent. At the date of the deed Greetham was under an unascertained liability for breach of the covenants in the lease, which resulted in a verdict for £50. The action merely ascertained the amount of the previously existing liability. If the case were under the old law, I should probably have concluded that there was no right of set-off. But the old decisions rested on the construction which the courts had put upon the words "mutual debts" and "mutual credits." The construction put upon those words produced some very remarkable decisions, but none more so than that in the case of *Rose v. Hart*, in which it was held that a fuller was not entitled to de-

⁽¹⁾ 2 B. & B., 89.

⁽²⁾ 8 C. B., 887.

⁽³⁾ 8 Taunt., 499.

⁽⁴⁾ Law Rep., 3 C. P., 444.

⁽⁵⁾ Ibid., 1 Ex., 58.

⁽⁶⁾ 15 C. B. (N. S.), 847.

⁽⁷⁾ 1 Bing. N. C., 743.

⁽⁸⁾ Law Rep., 6 Ch., 413.

⁽⁹⁾ Ibid., 6 Ex., 279.

tain cloths, deposited by a bankrupt before his bankruptcy for the purpose of being dressed, for his general balance for such work done by him for the bankrupt previously to his bankruptcy; for that there was no mutual credit under the statute 5 Geo. 2, c. 30, s. 28. Whether the doctrine laid down in that case would now [34] be *supported to its full extent, may well be doubted since the case of *Gibson v. Bell* (¹), even under the more restricted words of the old Bankruptcy Acts. But if that were so, the language of the act of 1869 is altered from that of the previous acts, and made more comprehensive. I must therefore conclude that the right of set-off given by the previous acts was considered to be too restricted, and was intended to be enlarged. [His honor then read the clause as it stood in the old acts, and sect. 39 of the present act, and continued:] Here there was no mutual debt, because the amount of the liability was unascertained at the date of the deed. There was hardly a mutual credit, but there certainly was a mutual dealing with reference to the house; and if there had been no bankruptcy, the right of set-off was clear. On one side rent was owing, and on the other side there was the amount of damages in the action. When they were ascertained the result was, that there was a balance of £10 against the estate. At the date of the deed Greetham was really liable for £50, only no one then knew the actual amount. But when it was ascertained it became at once a debt, and that was the amount really due at the date of the deed. Now, ought there to be a set-off? It is common justice, looking at the state of things at the date of the deed, that these transactions should be considered in the light of mutual dealings between the parties.

Then the question is, whether the act of 1869 allows unliquidated damages to be set off. For the first time since these clauses have appeared in Bankruptcy Acts, the words "mutual dealings" occur in addition to the words "mutual credits;" and it must be remarked that this is not the first time unliquidated damages have been treated as subject to the right of set-off, because the precise point came before the Common Pleas in the case of *Makeham v. Crow* (²). That was under the Act of 1862, in which the right of set-off was given in different language; but the question was precisely the same. It arose upon an action by the assignees of a bankrupt for the price of certain machinery sold and delivered by the bankrupt to the defendant, and the defendant pleaded an equitable plea of set-off for [35] unliquidated damages for *non-performance of the contract by the bankrupt. It was suggested in argument that the application was *ex parte*, but from the report it appears that a rule had been previously granted, and cause was then shown against it; and though the form of the judgment does not give

(¹) 1 Bing., N. C., 748.

(²) 15 C. B. (N. S.), 847.

much information as to the grounds on which the court arrived at the conclusion, it was held that the plea was good, reserving, however, to the plaintiffs the right to reply and demur. Therefore, when I find in this act these additional words, I am bound to assume that they were intended to give a more extended right of set-off than previously existed; and this case is so clearly one of mutual dealings that I must consider it as being within the scope of the act.

Then the appellants raise the question, whether the whole rent is to be set off on the principle on which a valuation of an annuity is made, or there must be an apportionment to the date of the deed, and only the portion previously accruing set off. It was said that a valuation of a lease would in many cases cause a very large amount to be set off, but that consideration does not apply in the present case, where the tenancy might easily be brought to an end by notice. The question, however, has to be decided, and I think that a rule may be deduced from the act of 1869, which will govern this point. By sect. 31 of the act "liability" is defined as including "any obligation, or possibility of an obligation, to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the close of the bankruptcy." I think that liability for rent is within that definition. My impression, therefore, is, that such rent as became due before the time which is analogous to the close of the bankruptcy — that is, before the distribution of the estate under the provisions of the deed — is the subject of set-off. The appeal will consequently be dismissed with costs; and I leave it to the County Court to determine whether the costs of the appellant are to be paid out of the estate.

Solicitors: Messrs. *Paterson, Snow, & Burney*; Messrs. *Gold & Sons*.

[Law Reports, 15 Equity Cases, 86.]

V.C.B. Nov. 7, 8, 1872.

*PARFITT v. CHAMBRE.

[36

[1870 P. 166.]

Ex parte D'ALTEYRAC.

Penalty — Claim under an Award — Payment ordered to be made as a Penalty — Whether recoverable in full, or to the extent only of such Damages as the Court might assess.

An action at law was by consent of the parties referred, and the arbitrator awarded and ordered that the defendant in the action should pay to the plaintiff

in the action an annuity of £1200 a year for life, and that, "in order to secure the annuity," the defendant should, within two months, purchase and convey to trustees, on behalf of the plaintiff, a government annuity of £1200 a year, and that if for any reason the annuity should not have been legally secured before the last day of the second month from the date of the award, then, in addition to the annuity, a further sum of £100 should become due and payable by the defendant to the plaintiff on the last day of the second month, and a like sum of £100 on the last day of each successive month, until such annuity should be legally secured; and the award added: "These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same."

No annuity, as directed by the award, having even been purchased; the plaintiff having been adjudicated a bankrupt; the defendant having died; and the £1200 a year and £100 a month having been regularly paid to the plaintiff and her assignees up to the defendant's death, but not since; upon claim by the assignees to prove against the defendant's estate for the payments due in respect of the annuity, and of the monthly payments accrued due since his death:

Held, that the £100 a month, though called a penalty, was not to be regarded strictly as such; and that the assignees were entitled to prove for the arrears both of the annuity and the £100 a month.

ADJOURNED SUMMONS. On the 20th of September, 1866, an action was commenced by Junia Maria Countess D'Alteyrac against the late Lord Willoughby d'Eresby, for the conversion and detention of certain plate, furniture, and effects; and on the 3d of February, 1868, by agreement between the parties, the action was referred. On the 4th of April, 1868, the arbitrator made his award, whereby, (after a preliminary statement of the grounds on which he had decided) he awarded (amongst other things) that Lord Willoughby should pay to the countess an annuity of £1200 for the term of her life, the 37] annuity to date from the 1st of April, *1868, and to be payable by half-yearly payments; and ordered the same accordingly. He further awarded that, "in order to secure the said annuity" to the countess, Lord Willoughby should, within two months from the date of the award, purchase from the commissioners for the reduction of the national debt an annuity of £1200 a year for life of the countess, and should convey the same to trustees on her behalf, named in a deed thereto annexed; and ordered accordingly. He further awarded that "if for any reason the said annuity shall not have been legally secured, as herein directed," by Lord Willoughby before the last day of June, 1868, then, in addition to the annuity, a further sum of £100 "shall become due and payable by" Lord Willoughby to the countess upon the same last day of June, 1868, and a further sum of £100 on the last day of each successive month, "until such annuity shall be legally secured;" and he ordered payment of the same accordingly. The award then proceeded thus: "These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same; but are not to prejudice the right of the countess to enforce the securing of the annuity by

other means. No purchase of any government annuity as ordered by the above award, was ever made.

In April, 1869, Madame D'Alteyrac was adjudicated a bankrupt.

In August, 1870, Lord Willoughby died. Up to this date half-yearly payments in respect of the annuity of £1200, and monthly payments of £100, had been regularly made to Madame D'Alteyrac and her assignees; but no such payment had been made since.

In September, 1870, the present suit was instituted by a creditor, for the administration of Lord Willoughby's estate; a decree was made in the November following; and in March, 1871, a claim was brought into chambers by the assignees in bankruptcy. The claim now made at the bar on behalf of the assignees was for two sums, viz., £600, being the half-year's payment of the annuity which fell due on the 1st of October, 1870; and £700 being an aggregate of seven monthly payments due respectively *on the last days of every month from [38 August, 1870, to February, 1871. The claim was resisted on two grounds, one a question of fact, whether or not the countess had refused to furnish such evidence as to her age as was necessary to render possible the purchase of the annuity; the other, a question of law, as to whether the monthly payments of £100 were to be regarded in the light of liquidated damages, or of a penalty only. The view taken by the court on the former question will be found stated in the judgment.

Mr. *Amphlett*, Q.C., and Mr. *Crossley*, for the assignees: The true construction of the award is, that these monthly payments were intended as a compensation for the countess in case the testator should fail to fulfil his obligations under the award. It was thought that, if the testator omitted to purchase the annuity and convey it to the trustees, the countess having, instead of realized property, only the personal security of a tenant for life, would suffer damages to an extent beyond what any jury would be willing to assess. The event has happened that the testator did omit to purchase and legally secure the annuity; and it is impossible now to estimate how much the estate of the countess has suffered from the omission. To meet this difficulty, the amount of damages, namely, £100 a month, is fixed by the award, i.e., by agreement between the parties themselves: *Rolfe v. Peterson* ⁽¹⁾ and other cases in the argument in *Sloman v. Waller* ⁽²⁾. The award is, in fact, a contract in the alternative—either to purchase and settle an annuity, or to pay an annuity, plus £100 a month, until purchase and settlement. The case of *Rolfe v. Peterson* also shows that the occurrence of the word

(1) 2 Bro. P. C., 436.

(2) 1 Bro. C. C., 418.

"penalty" will not make an engagement to pay a penalty in the strict sense of the word, where the meaning of the parties evidently was to fix a sum in damages. [They also cited and commented on Chitty on Contracts ⁽¹⁾.]

Mr. *Higgins*, Q.C., and Mr. *Gardiner*, for the plaintiff: The award is not binding on the court by reason of discrepancies 39] *between the award itself and the introductory matter. Where an arbitrator assigns motives and explains the grounds of his decision, the court, if it finds inconsistencies, can go behind the award without bill filed.

Mr. *Kay*, Q.C., and Mr. *Simmons*, for the defendant, the executor: This award comes within the well-settled rule, that where a sum is ordered to be paid by way of penalty, this court will relieve against it, to the extent of everything beyond actual damage incurred: Chitty on Contracts ⁽²⁾. Here the intention of the arbitrator was to secure the payment of an annuity of £1200 a year. He expressly declares that the additional payments are to be regarded as a penalty for "delay." The only case in which it is said that a payment described as a penalty shall not be dealt with as such, is that of breaking up pasture lands in breach of covenant in an agricultural lease. Moreover the default of the plaintiff in the action to furnish the necessary information has excused the payment of the penalty: *Bryant v. Beattie* ⁽³⁾. [The VICE CHANCELLOR: To what do you say the claim of the assignees should be limited?] Mr. *Kay*: To a claim for the price of a government annuity of £1200 a year, and for such damages, if any, as the court shall think fit to award for the delay in the purchase of the annuity.

SIR JAMES BACON, V.C.: I think the case is sufficiently clear to make it unnecessary for me to call upon Mr. Amphlett for a reply. The award is in very plain terms, and although the word "penalty" occurs, that cannot be treated as creating a penalty in the strict sense of the word, but it must be taken in the sense in which it is used, consistently with all the other provisions of the award. Nor can I go into any inquiry as to what were the motives of the arbitrator, or what he intended, further 40] than to observe that, *as I read the terms of the award, they are plainly referable to the circumstances which have been mentioned in the course of the argument. The object of the award was to provide, by a secured annuity, £1200 a year for this lady. With that view the arbitrator directs, orders, and awards, that the testator shall purchase such an annuity; and then, in order not to leave the claimant without present provision, but to provide, although not in words, yet in substance, for that which might happen, and which has happened, namely,

(¹) Ed. 1871, p. 822.

(²) Pages 819-821.

(³) 5 Scott, 751.

delay and default on the part of the testator in procuring the annuity — a present payment of £100 a month is directed to be made. Whenever the testator thought fit, he might have relieved himself from the obligation of that payment by performing the other branch of the award, namely, the purchase of a government annuity. Nothing can be clearer and plainer. "Penalty" it is, but penalty in order to secure the performance of the other branch of the award, with perfect power and liberty for the person upon whom the burden is cast to relieve himself from that penalty or additional payment whenever he shall think fit. That is not a penalty which courts of common law or courts of equity can allow, to be relinquished or satisfied, except upon the terms of performing that very thing which the introduction of the "penalty" (I call it by that name since that has been preferred by the opponents to this claim) imposes in order to effectuate it. Is there a trace of Lord Willoughby d'Eresby ever in his life having applied to the government commissioners for the reduction of the national debt? or any proof that, then or now, there ever was or is any intention whatever of performing the award upon the second branch, that is, of providing a secured annuity — one that shall not depend upon personal obligation, but a secured annuity — for the term of this lady's life?

It was said by Mr. Kay in his argument, and it was also urged by Mr. Higgins, that since there was something incumbent upon this lady to do, and as she had not done that thing, therefore she cannot complain. In my opinion that is merely inverting the rights of the case. No doubt there is something for her to do. If the testator, or those who now represent him, had gone to the government office and bargained for the terms of an annuity, there *being no doubt about the indentify of [41] the person who is to receive the annuity, and no reasonable doubt about her age, since it appears the testator had in his possession a certificate showing what her age was, and there had turned out to be an inaccuracy in the register, that inaccuracy might have been removed by other evidence. If they had gone to the government office, and bargained for the price of the annuity, and all that remained had been to comply with the requisitions of the statute, or any other regulations which the government commissioners may have established, their next step would have been to say to the claimant, "Now you must help us with this evidence; we have to prove that you were born at the time mentioned, and you must tell us how we can clear up the difficulty and inaccuracy contained in the baptismal certificate, which can be done by a declaration, or upon any other proper evidence." No such thing has ever been done in any step in the cause. The claimant, on her part,

says, "Whenever you are ready, whenever you have got the contract for the purchase of the annuity, I will do all that is incumbent upon me." Mr. Kay has endeavored, by referring to the case of *Bryant v. Beattie* ⁽¹⁾, which he thought had some analogy to this, to show that there has been some default on the part of the claimant; and that, by reason of that default, the promisor is absolved from the performance of his engagement. I find no trace of any such thing in point of fact. I see no reason why now the government annuity cannot be purchased. I know nothing about the condition of the estate. If it cannot be purchased, then there must be a claim for the damage which has been sustained, and which may be hereafter sustained, by reason of the government annuity not having been bought, and of there being no security for the payment of that amount. Then the other sum of £100 a month becomes payable by the very contract between the parties; and I adopt no violence of expression when I say "contract," for the award amounts to a contract between the parties. I find in the correspondence what I cannot help thinking is the real state of the case. It is discovered, from the certificate coming from Guienne, that there is a mistake in the names of some of the 42] *persons mentioned in the register. That is a difficulty which the respondents in this case say must be removed by the claimant. I do not think so at all. I think the claimant must do everything incumbent upon her for the performance of the undertaking; but I do not think that she is obliged to do any more. Whatever she may be obliged to do, she cannot be required to do it until something plain and definite is tendered to her, the non-performance of which can be imputed to her as a fault. The objection seems to me to rest entirely, as I have said, upon an ingenious notion, which has nothing but its ingenuity to recommend it, that by reason of these defects in the evidence the claimant is in such a position as that she is to be held at the staff's end, and that her just demands shall be defeated if possible, or at all events postponed.

I think that the award is a perfectly clear award. I think that the claimant is entitled to the £1200 a year awarded to be paid to her by means of a government annuity, and to the payment of £100 per month until that is purchased, and no longer. After that all notion of penalty will cease. What is it the assignees precisely claim for?

Mr. *Amphlett*: We claim for the £600 and the £700 as present debts. We also claim future payments of the £1200 a year, and of the £100 a month until the annuity shall be secured. We make no claim now for a capital sum; if the estate should

(1) 5 Scott, 751.

V.C. B. In re United Merthyr Collieries Company. 1872

be insolvent, we may have to prove for the value of the annuity as a capital sum; but the court will not deal with that now. The future payments will be dealt with in the same way as other annuities are dealt with.

The VICE CHANCELLOR assented.

The costs of all parties, those of the executor as between solicitor and client, were ordered to be paid out of the estate.

Solicitors for the claimant: Messrs. *Bailey & Child.*

Solicitors for the plaintiff: Messrs. *Lumley & Lumley.*

Solicitors for the defendant: Messrs. *Travers-Smith & Co.*

[Law Reports, 15 Equity Cases, 46.]

V.C. B. Nov. 14, 1872.

*IN re UNITED MERTHYR COLLIERIES COMPANY. [46]

Adjoining Coal Mines—Trespass—Measure of Damages for Coals wrongfully taken—Mode of taking Account.

Where coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser (in the absence of any suggestion of fraud) will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal.

In this case an order was made on the 19th of December, 1871, upon the application of the Powell Duffryn Steam Coal Company, allowing their claim against the United Merthyr Collieries Company in liquidation "for such an amount as is equal to the value, according to the average price of steam coal from the Abergwawer pit in 1864 and 1865, at the pit's mouth, of 16,932 tons of coal, after deducting therefrom the actual cost of severing the said 16,932 tons of coal, and the actual cost of carrying the same to the pit's mouth, such deductions to be settled by the judge in case the parties differ."

The coal in question had been wrongfully taken by the United Merthyr Company from the adjoining colliery of the Powell Duffryn Company by working beyond their boundary. When the matter came on in December, 1871, upon the claim of the Powell Duffryn Company, as creditors under the winding up of the United Merthyr Company, for the value of the coal taken from within their boundary, his honor was of opinion that the case of trespass was clearly proved against the United Merthyr Collieries Company, but that as there was no suggestion of fraud it was a case for the application of the more lenient rule, and accordingly that they must pay the value of 16,932 tons of

coal at the pit's mouth, deducting the cost of severance and the 47] cost of carrying to the pit's mouth (*). *When the matter was before him in chambers, the chief clerk decided that, under the order, the United Merthyr Company were not entitled to any deductions beyond the bare expenses of severing, banking, and raising up, taking the words in their literal sense. The liquidators of the United Merthyr Company now moved that the chief clerk might be directed, in proceeding on the order of the 17th of December, 1871, and in ascertaining the actual cost of severing the 16,932 tons of coal, and the actual cost of carrying the same to the pit's mouth, to include all the working expenses incurred by the United Merthyr Company in bringing the coal to bank, including therein not only the money paid for cutting, banking, and raising the said coal, but also the wages, cost of wear and tear, and consumption of material and stores, 48] without which *the coal could not have been brought to the pit's mouth, but not including any proportion of the expense of sinking the shaft, or any other capital expenditure, or any interest on capital expenditure.

Mr. Eddis, Q. C., and Mr. A. Dixon, in support of the motion: The question is, what costs and expenses are attributable

(*) SIR JAMES BACON, V.C.: In cases of fraud, of course, there can be no doubt. In cases even partaking of fraud there can be no doubt. I am not quite sure that I understand what is meant by the learned judge who uses that word "negligence" (Baron Parke in *Wood v. Morewood* 3 Q. B., 440, n.), nor to what extent that may be carried; but what weighs with me in this case is, that I find in the lord chancellor's observations (*Jegon v. Vivian*, Law Rep., 6 Ch., 742) a strong disposition to apply what he calls the milder rule of law whenever it can possibly be done. Here there is no suggestion of fraud that I can attend to.

There has been no evidence relating to it, and it may have been a mere mistake. But what also weighs with me greatly is this. The claimants are themselves owners of mines. They seek their profit by severing the coal in the mine and bringing it to the surface and then selling it. If they had been undisturbed in the possession of which they now complain they must have incurred an expense in severing the coal before they could have made a profit. The mere disbursement, then, which has been made by the United Merthyr Company in severing the coal

is doing no wrong that I can see to the claimant; but I repeat that if there was the slightest color of fraud, or anything like unfair dealing in the matter, I should be disposed, notwithstanding the authorities I have referred to, to hold that the case came within the rule which enables the court to fix the largest amount of compensation. I regret that there is not a plainer rule upon the subject. It ought not to be left to the judgment of individual judges as to what is the rule to be applied to trespasses of this kind. Still, as I find the law in a certain state of confusion, and the more mitigated rule having been greatly favored, not only by the observations of the lord chancellor, but in the other case (*Wood v. Morewood* 3 Q. B., 440, n.), decided by the late Mr. Baron Parke, I think that the cost of merely severing—the actual disbursement—must be deducted from the sum which the claimants are entitled to. They could not have had the gain which they proposed to themselves unless they had undergone that expense. They get the value of their property with a deduction for that which, if the trespass had not been committed, they would have had to bear.

to the severance and bringing of the coal to the pit's mouth. In the absence of fraud or negligence on the part of the trespasser, he has been treated as if he had been the purchaser of the coal at the pit's mouth, and from the purchase money payable to the owner as compensation will be deducted all fair and just allowances in respect of the cost of getting and raising such coal: *Powell v. Aiken* ⁽¹⁾; *Wood v. Morewood* ⁽²⁾; *Morgan v. Powell* ⁽³⁾; *Hilton v. Woods* ⁽⁴⁾; *Jegon v. Vivian* ⁽⁵⁾; in which cases the more lenient form of account was directed in place of the stricter form — giving no allowance for getting the coal — adopted in *Phillips v. Homfray* ⁽⁶⁾; *Llynvi Company v. Brogden* ⁽⁷⁾; *Martin v. Porter* ⁽⁸⁾. All we want is, that in working out the order the chief clerk shall make us all just allowances for our charges and expenses on account of severance, and also on account of carriage to the pit's mouth.

Mr. Kay, Q.C., Mr. Charles Hall, and Mr. Bidder, for the Powell Duffryn Company, were not called on.

SIR JAMES BACON, V. C.: I have not the slightest intention of interfering with or departing from the decisions which have been mentioned to me, especially in the more recent cases, because, as I recollect, there was want of exact agreement between some of the common law cases and some of those which had formerly been decided in this court. I take the difference now to be entirely removed and the rule to be clearly and plainly established, and so understanding, I made the order in this case. The words which are supposed to have been used are "actual cost and expenses" — the word that has been read [49 from the short-hand notes is "disbursements." In my opinion there is not the slightest doubt about the meaning of either of those expressions. It is said that the trespasser must be treated as if he had been the purchaser. Now that must be taken with a certain qualification. It is a useful illustration of what the court meant to decide in the particular case where that expression is to be found; but the principle of the decision is that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements. If he had brought it to the pit's mouth when severed, he could only have done so by means of disbursements. If he himself had severed and brought the coal to the pit's mouth, whatever the value of it might then be would have

⁽¹⁾ 4 K. & J., 343.

⁽²⁾ 3 Q. B., 440, n.

⁽³⁾ *Ibid.*, 278.

⁽⁴⁾ *Law Rep.*, 4 Eq., 432.

⁽⁵⁾ *Law Rep.*, 6 Ch., 742.

⁽⁶⁾ *Ibid.*, 770.

⁽⁷⁾ *Ibid.*, 11 Eq., 188.

⁽⁸⁾ 5 M. & W., 351.

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to be deducted, because he would have borne the expenses on both these heads, which would have been actual disbursements, not profit; nor do "just allowances" mean profit; but if I were to change the words of the order, I might leave it doubtful, or might open up some ground for argument, as to what is meant by "just allowances." The order has been settled, not without the knowledge of both parties, and when I am asked to interpret the words of it, I have the means of doing so distinctly by reference to the shorthand notes in which the word "disbursements" occurs. There can be no doubt as to what "the actual cost" means. The trespasser is not to charge as if somebody else had employed him to sever. If he had paid a certain sum to his workmen, and by the custom of the trade was entitled to charge a certain other sum, he is not to have the larger sum. The plaintiff is to be put in the same situation as he would have been in, neither better nor worse, if he himself had severed the coal and brought it to the pit's mouth. That must have been done, and could only have been done by means of disbursements, not by any profit, not by any allowance in the trade, not by any artificial mode of guessing at it; but the books he must have kept would show how much money he spent in severing the coal, and how much money he spent in bringing it to the pit's mouth. My opinion is that the matter is perfectly clear, 50] and that I could not usefully or properly alter any one part of the order. Now I see no difficulty in working out the order. When the chief clerk has taken the account, if he takes it rightly, there is an end of it. If he takes it wrongly, and does not allow that which is just, the persons who have a right to complain may then complain. At present I cannot interfere in the slightest degree, although I do not hesitate to say now (notwithstanding what has been said by Mr. Eddis) what I meant by the judgment I then pronounced, and what, in my opinion is the meaning of the words used in the order.

His honor added that he had no reason to doubt that the Merthyr Company, in the course of their working the mine, kept books of account, wages books, and other books; and any person looking into those books could extract from them every farthing which had been spent (it was disbursement that he was speaking of) in working the coal. What was spent in bringing it to the pit's mouth, wages or whatever else it was, could by the same process be ascertained. He was satisfied that upon principle and in fact there could be no difficulty in ascertaining what the plaintiff would have had to pay out of his pocket if he had severed the coal and brought it to the pit's mouth, and that amount, whatever it was, the Merthyr Company had a right

to have deducted from the value of the coal at the pit's mouth for which the company were made answerable to the plaintiff (!).

Solicitors: Messrs. *Tatham, Curling, Walls & Pym*; Messrs. *Williamson, Hill & Co.*

[Law Reports, 15 Equity Cases, 55.]

V.C.W. Nov. 18, 1872.

*STOCK v. McAVOY.

[55

[1870 S. 128.]

Advancement — Reservation of Interest by Donor — Rebuttal of Presumption — Purchase by a Father of Copyholds. (1)

A father purchased a copyhold cottage in the name of his son. Shortly after the purchase the father served notice to quit on an occupying tenant, but afterwards allowed her to remain at an increased rent, and during his life received the rents and paid the outgoings:

Held (notwithstanding evidence of declarations that the cottage was the son's after his father's death), that the purchase was not an advancement.

On the 9th of November, 1860, Philip McAvoy, the testator, purchased with his own moneys a copyhold cottage, called Rose Cottage, near Woodford Bridge. The testator's son, Thomas McAvoy, was by his direction admitted tenant on the court roll, but the father paid the fine, £15, and £2 13s. 4d. quit rent. He had previously been living at Chigwell, and was in want of a residence. He shortly afterwards called on the then tenant of the cottage, a Mrs. Sutton, and gave her notice to quit, at which she *was very much distressed. A few days after- [56 wards, she called on the testator, and informed him she was unable to find any other residence, and seemed so much affected at leaving the house, that the testator consented to allow her to remain at a rent of £18 instead of £12, which she had previously paid. The testator always received the rents and applied them to his own use, and the receipts were generally, but not invariably, made out in the name of the son. The testator always paid the quit rent and the cost of the repairs of the cottage out of his own moneys, and always treated the cottage as his own property. The testator died on the 2d of August, having by his will directed his wife and his son Thomas McAvoy, whom he appointed executrix and executor of his will, to convert into money his estate (other than his freehold, copyhold, and leasehold estate), and to invest the same, and to pay the produce of the fund and of his real estates to his widow for life, remainder to his son for life, remainder to his son's wife for life, and then to hold the same on trust for the children of his son Philip. The

(1) See *Moak's Van Santvoord's Pleadings*, 480.

will was duly proved. The testator died in 1870, and a bill was afterwards filed to administer his estate, and on the 23d of July, 1870, an administration decree was made, with an inquiry, *inter alia*, of what freehold, copyhold, and leasehold estate the testator died possessed of. Shortly after the bill was filed Thomas, the son, died, having devised his real estate to his widow. The chief clerk, by his certificate, dated the 5th of May, 1871, found that Rose Cottage, let to a Mrs. Sutton, formed part of the testator's estate; but added a note that it was claimed by the widow of the son Thomas, who was the devisee. The widow of Thomas took out a summons to vary the chief clerk's certificate, and the matter now came before the court on that summons, and on further consideration. In addition to the facts above stated, there was a great deal of evidence as to the declarations by the testator. The son's widow stated that she had heard testator tell his son that he was to consider Rose Cottage his own on testator's death, and that he, testator, had bought it for him, and intended it for the son's benefit after testator's death; that the son was admitted tenant to save the expense of a fine; that she well recollected testator, two or three days before his death, saying to Thomas, when he was talking of [57] *his affairs, "there is that Rose Cottage, my boy, I wish you to take the rent of that directly: no one can dispute your right to that." The testator's widow stated that the son Thomas was admitted tenant to save the expenses of a fine, as he would probably outlive his father and mother. On one occasion she remembered testator saying, "You are a young man Tom, and we are old; so I will take it (the cottage) up in your name, and that will save money when we are gone." Several other witnesses gave evidence of declarations by the testator that he had purchased the cottage for his son.

Mr. *Coll*, for the summons: This case is well within the authorities. In *Dyer v. Dyer* ⁽¹⁾ copyholds were purchased by the father, and were granted by the lord to the father, his wife and a younger son, in succession. The father paid all the purchase money, enjoyed the property for his life, and then by his will devised to another son. The devisees of the father filed a bill, alleging that there was a resulting trust to the testator, but the court held that the transaction was advancement. This is almost exactly the present case. It is impossible to suggest any reason why the son should have been admitted tenant, except for his own benefit. In *Finch v. Finch* ⁽²⁾ Lord Eldon said that *Dyer v. Dyer* was fully considered, and was intended to settle the law, "and that the principle of law and presumption was not to be frittered away by nice refinements." Then it was

(1) 2 Cox, 92.

(2) 15 Ves., 48-50

said that, the father having received the rents, the presumed advancement must be held to be rebutted; but that was not the doctrine of this court: *Taylor v. Taylor* ⁽¹⁾. So in *Grey v. Grey* ⁽²⁾ the father was the owner of the money, received the profits for twenty years, granted leases, took fines, inclosed and built on the land, gave directions for selling it, treated for the sale, but yet it was held an advancement. *Murless v. Franklin* ⁽³⁾ was to the same effect. On these authorities it is clear that Rose Cottage is the property of the son's devisee.

*Mr. W. Pearson, and Mr. Maidlow, opposed the sum- [58
mons: Either this is an advancement or it is not, as there can be no intermediate case. If it is not an advancement, there must be a resulting trust for the purchaser. But whatever might be the ultimate intention, if any prior interest was reserved for the life of the purchaser, it is not an advancement within the rule: *Dumper v. Dumper* ⁽⁴⁾; *Bone v. Pollard* ⁽⁵⁾; *Williams v. Williams* ⁽⁶⁾. The only admissible evidence must be contemporaneous. The decisions show that evidence of the purchaser's intention must be contemporaneous with the purchase: *Murless v. Franklin* ⁽³⁾. Here all the admissible evidence shows that the intention was that the father was to have a prior life estate, and therefore there is no advancement. Secondly, the evidence clearly shows that in this case the testator retained possession so ostensibly as to get rid of the difficulty to be found in some of the cases. This of itself shows that there was no advancement.

Mr. Coll, in reply: *Bone v. Pollard* is no authority on the question of advancement, the father, in that case, having become incapable of superintending his business (that of a farmer), and the capital was consequently transferred into the daughters' names jointly. All the facts negatived the idea of any advancement. *Williams v. Williams* is really an authority in the son's favor, for it shows that the receipt of rents by the father does not rebut the presumed advancement.

SIR JOHN WICKENS, V.C.: Where a father purchases property in the name of his son, without making any formal declaration of trust, it is either a gift to his son absolutely or he is a trustee for his father. If the son is a trustee at all, he is wholly a trustee; but the strong presumption of law is that he is not a trustee at all; and it can only be displaced by evidence. In this case the father and son are both dead, *and the [59
admissible evidence consists of contemporaneous statements and acts, and of subsequent statements of either of them against

(1) 1 Atk., 386.

(2) 2 Sw., 594.

(3) 1 Sw., 13.

(4) 3 Giff., 538.

(5) 14 Beav., 288.

(6) 32 Beav., 370, 375.

the interest of the party making them. It is said that the taking possession by the father at the time of the purchase is insufficient in general to rebut the presumption; but this does not, I conceive, apply where there is a formal and unmistakable act of taking possession. Suppose a man bought a shop in his son's name, and immediately took possession and put his own name over the door, that would be an ostensible taking possession sufficient to show ownership in the father and trusteeship in the son. In this case the father called on the tenant, and gave notice to quit, but ultimately allowed her to remain. Perhaps I am not justified in treating that circumstance as a formal and unmistakable act of taking possession by the father, sufficient to establish that he purchased for himself. But it is a circumstance of great weight, and looking at this and the rest of the evidence, I am of opinion that the chief clerk was right in finding that this was a trust and not an advancement. There must be a declaration that the son was a trustee for the father. The costs of the summons to be costs in the cause.⁽¹⁾

Solicitors for the plaintiff: Messrs. *Morris, Stone & Co.*

Solicitors for the summons: Messrs. *Turner & Son.*

[Law Reports, 15 Equity Cases, 59.]

V.C.W. Nov. 5, 6, 1872.

ALLSOPP v. WHEATCROFT.

[1871 A. 97.]

Covenant in restraint of trade — Void if unnecessarily extensive.

A covenant by a clerk and traveler with a firm of brewers that he would not during his service or within two years afterwards, either directly or indirectly, sell, procure orders for, or recommend, or be in anywise concerned or engaged in the sale or recommendation, either on his own account or for any other person, public company or corporation, of any Burton ale or porter brewed at Burton, or offered for sale as such, other than the ale, beer, or porter brewed by the plaintiffs: *Held*, void, as unnecessarily extensive.

In January, 1862, the persons then constituting the firm of Allsopp & Sons, brewers, of Burton-on-Trent, entered into an [60] agreement in writing with the defendant, dated the 6th of January, 1862, which, so far as is material to the case before the court, was as follows:

"Whereas Allsopp & Sons have agreed to admit W. Wheatcroft into their service as clerk and traveler upon his entering into such agreements as are hereinafter contained, Now, therefore, in consideration of the premises, the said W. Wheatcroft doth hereby engage and agree to and with the said firm that he,

(¹) See *Moak's Van Santvoord's Pleadings*, 664.

W. Wheatcroft, shall well and truly, at the salary of £100 per annum, or at such other salary as shall be from time to time agreed upon, serve the said firm, notwithstanding any change in the partnership, as their clerk and traveler, from the day of the date hereof until such service shall have been determined as hereinafter mentioned; and that during the continuance of the said service W. Wheatcroft shall faithfully serve his said employers to the best of his knowledge and ability, and devote his whole time and attention to their service in the employment aforesaid; and that during the time he shall remain in such service he shall not sell nor engage in the sale of any other articles or goods of any description whatsoever, and that he shall from time to time, when thereto required of them, duly pay, hand over, and deliver to the said firm all moneys, securities for money, goods, articles, and things belonging to them, or collected or received by him on their account, or committed to his care for their use, and that the said W. Wheatcroft shall not at any time during his said service, or within two years subsequent to his quitting the same service, either directly or indirectly, sell, procure orders for the sale, or recommend, or be in any wise concerned or engaged in the sale or recommendation, either on his own account or for any other person or persons, or public company or corporation, of any Burton ale or beer or porter, or of any ale or beer or porter brewed at Burton, or offered for sale as such, other than the ale or beer or porter brewed by the said firm. And it is hereby mutually agreed by and between the said parties hereto that the said service may at any time hereafter be determined by three calendar months' notice in writing given by either of the said parties to either of them for that purpose: Provided always, and this agreement is upon this express condition, that W. Wheatcroft shall give and keep on foot during the continuance of his service security to be approved of by the said firm to the amount of £200 for the faithful service of *him, the said W. Wheatcroft, in his [61] said employment. And unless such security be so given and kept on foot this agreement, on the part of the said firm, shall thereupon become null and void."

The agreement was signed by the defendant (but not by the plaintiffs), and he entered upon such service as traveler and clerk, in which capacity he continued in the service of the firm till August, 1866, when he was appointed manager, traveler, and agent at Chesterfield. He remained in such employment until the 1st of April, 1871, when, as the plaintiffs alleged, he was dismissed for misconduct, but as he himself swore, he left of his own free will. The defendant's duties at Chesterfield were to have charge of the stores and to solicit orders in the

neighborhood. The bill alleged that the defendant, within the period specified in the agreement, had engaged himself as a traveler to another firm of brewers at Burton-on-Trent, and solicited orders on their behalf, and that the plaintiff's business had suffered in consequence. The defendant alleged in his answer that he had offered, since leaving the service of Allsopp & Sons, to sell to various persons the plaintiffs' beers, but they had refused to supply him, and that, under the circumstances, he had entered the service of Messrs. Cooper, and solicited orders on their behalf. A great deal of evidence was adduced on both sides as to the conduct of the parties and as to the meaning of "Burton Ale," but the vice chancellor's judgment proceeded solely on the terms of the contract.

Mr. *Dickinson*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Cookson*, for the plaintiffs: The result of the cases seems to be, that although all restraint of trade, if there be nothing more, is invalid, *Müchel v. Reynolds* ⁽¹⁾, yet an agreement for a particular restraint may be good if, first, it be not unlimited; secondly, if it be for a good consideration; and thirdly, if it be only what is necessary for the reasonable protection of the covenantee. This principle would be found to reconcile all the authorities, a great many [62] of which are collected in *Avery v. *Langford* ⁽²⁾. In *Ward v. Byrne* ⁽³⁾ the question was very much considered, and the restraint in that case was held void; but because, from the nature of the trade, a coal merchant's business could not have required so extensive a restriction as was comprised in the agreement. In the *Leather Cloth Company v. Lorrson* ⁽⁴⁾, a covenant not to carry on a particular business in any part of Europe was held valid. It was argued in that case that this amounted to a restraint throughout the United Kingdom, and was bad, but Sir W. M. James, then vice chancellor, observed ⁽⁵⁾ that in his opinion the effect of the authorities was not to establish an un rebuttable presumption against such a covenant, provided it were natural and not unreasonable for the protection of the parties contracting. But even assuming that upon the language the restraint was unnecessarily extensive, it was nevertheless valid to a reasonable extent. In *Mallan v. May* ⁽⁶⁾ the covenant was that the defendant should not practice in London, or in any of the places where the plaintiffs might have been practicing, before the expiration of the said service; and it was held that the stipulation not to practice in London was valid and the rest invalid. So in *Green v. Price* ⁽⁷⁾, where the covenant was not to

(1) 1 P. Wms., 181.

(2) Kay, 663-667.

(3) 5 M. & W., 548.

(4) Law Rep., 9 Eq., 345.

(5) Law Rep., 9 Eq., 353.

(6) 11 M. & W., 653.

(7) 13 Ibid., 695; 16 Ibid., 346.

carry on the business of a perfumer in the cities of London and Westminster, or within 600 miles of the same, the covenant as to London and Westminster was held valid, and the other part of it bad. These cases established the important principle that a covenant, in its nature reasonable and for valuable consideration, but unnecessarily extensive in its terms, is only void as to the excess. The reasonableness is a matter to be determined by the court, and though it might be difficult in this case to define any area where the plaintiffs' business would not be injuriously affected by a competition with a discharged servant, still an approximation might be made. On these grounds the plaintiff is entitled to a decree. [They also cited *Mitchel v. Reynolds* (¹), and the authorities therein mentioned.]

*Mr. Greene, Q.C., and Mr. W. Pearson, for the defend- [63
ant: First, it must be observed that all agreements for the restraint of trade are *prima facie* bad: *Mitchel v. Reynolds* (²); and the onus lies on those who support them to show that they are within the exceptions. The law on this subject is very clearly laid down by Chief Justice Tindal, in *Horner v. Graves* (³), as follows: "The principles which govern the cases are these: Any agreement restraining a person from exercising a lawful occupation is void; but if it be shown to be for valuable consideration, and that the restraint is reasonable, that is to say, is no more than necessary for the protection of the contractee, then it is valid." This exposition of the law has been adopted by all the subsequent judges; by Chief Justice Denman in *Hitchcock v. Coker* (⁴); by Chief Justice Tindal again, and by the whole court (⁵) in the same case; by Lord Abinger and Baron Parke in *Ward v. Byrne* (⁶); again by Baron Parke in *Mallan v. May* (⁷), and by Lord Langdale in *Whittaker v. Howe* (⁸); by Vice Chancellor Wood in *Avery v. Langford* (⁹); by Vice Chancellor James in *Leather Cloth Company v. Lonsont* (¹⁰). Upon these authorities it is perfectly clear that unless this agreement fulfill the conditions which all these learned judges considered essential, it is bad. Now, then, turn to the agreement: first, as to the time (two years), perhaps that may be free from objection. Then, as to the subject matter, it appears from the agreement itself that there is Burton ale that is not brewed at Burton. All articles of commerce, which originally have been produced in some particular place, when they come into general use retain their name. The effect of this stipulation, there-

(¹) Sm. L. C., Vol. i. p. 356.

(²) 1 P. Wms., 181.

(³) 7 Bing., 735, 743.

(⁴) 6 A. & E., 438, 444-445.

(⁵) Ibid., 458.

(⁶) 5 M. & W., 548, 559-561.

(⁷) 11 Ibid., 658, 665-667.

(⁸) 8 Beav., 383, 393.

(⁹) Kay, 663.

(¹⁰) Law Rep., 9 Eq., 845.

fore, might be to prevent the defendant from selling any beer, and that would be too general, and void. Then look at the nature of the employment which is restrained under these words. The defendant is restrained from acting as a beer merchant, a beer bottler, a cellarman, a publican, a barman, a waiter. Can this sweeping restraint be necessary for the plaintiffs' protection? Surely not. Then turn to the area where the [64] restraint is to operate. There *is no limit; the wide world, therefore, is the area comprised in the restriction; but how can that be necessary for the plaintiffs' protection? No lawful employment can be subject to such general restraint: *Ward v. Byrne* ⁽¹⁾. Then it is said that this contract may be bad to some extent but good for the rest, but it does not admit of division. It is either bad or good in its entirety. None of the cases relied on to support this agreement have any application. In *Davis v. Mason* ⁽²⁾, *Homer v. Ashford* ⁽³⁾, *Whittaker v. Howe* ⁽⁴⁾, *Mumford v. Gething* ⁽⁵⁾, *Harms v. Parsons* ⁽⁶⁾, *Leather Cloth Company v. Lorrant* ⁽⁷⁾, the principle was admitted by the judges, though they considered the particular case did not violate the rule. On these grounds this agreement must be held void.

Mr. Dickinson, in reply: It is for the court to consider what is a reasonable restriction, and that is all the plaintiffs seek.

SIR JOHN WICKENS, V.C.: The question in this case is purely legal, viz., as to the validity of the covenant in restraint of trade. There has been a natural inclination of the courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void. This seems to have been treated as clear law in *Ward v. Byrne* and in *Hinde v. Gray* ⁽⁸⁾, and in other cases; and the rule, if not obviously just, is, at any rate, simple and very convenient. No doubt, in the case of the *Leather Cloth Company v. Lorrant*, Lord Justice (then Vice Chancellor) James threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area; but there were expressions in the instrument in that case limiting the generality of the covenant, and it was in substance a case of a different class from this, since the restriction against trad- [65] ing was only a consequence of a clearly *lawful restriction against divulging a trade secret. In this point of view it may probably be thought to bear some analogy to *Wallis v. Day* ⁽⁹⁾.

⁽¹⁾ 5 M. & W., 548.

⁽²⁾ 5 T. R., 118.

⁽³⁾ 8 Bing., 322, 328

⁽⁴⁾ 8 Beav., 333.

⁽⁵⁾ 7 C. B. (N.S.), 305.

⁽⁶⁾ 32 Beav., 328.

⁽⁷⁾ Law Rep., 9 Eq., 345.

⁽⁸⁾ 1 Man. & G., 195; 1 Scott (N.R.), 123.

⁽⁹⁾ 2 M. & W., 275.

C.J.B.

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Assenting, as I do, to everything that was said in *Leather Cloth Company v. Lhorsont* ⁽¹⁾, I can hardly treat it as authorizing me to depart from the recognized rule as to limitation of space in a case so different from it as the present is, and unless that rule be departed from the covenant here is clearly bad.

But the conclusion here would be the same if no such rule existed. Messrs. Allsopp & Co., brewers at Burton-on-Trent, engaged a traveler to seek orders for their beer, and bound him by a covenant, which has been so often read that I need not mention the terms of it. Of course the protection that they sought was primarily against the competition of other brewers of real or pretended Burton ale, and their first object was to prevent the defendant from turning against them his connection with, and knowledge of, their customers. This they might reasonably and lawfully have stipulated for. But the covenant goes further than this, and, in fact, beyond anything that can be reasonably required for the plaintiffs' protection. It seems to me that, according to the view taken in the cases, it could not have been held necessary for the plaintiffs' protection to prevent the defendant from soliciting orders for the ale of other Burton brewers in places where Burton ale had never been sold or heard of, and probably, as Mr. Pearson argued, the covenant would, even within the limits where Allsopp's company had customers, prevent lawful acts of the defendant which would not injure the plaintiffs. I am bound by the authorities to hold the covenant inoperative independently of any absolute rule requiring a limitation of area. Therefore, without considering the other questions raised on the part of the defendant, I think the plaintiffs' case fails, but as the defendant has, according to my view, deliberately done the express thing he bound himself not to do, and escapes the consequences on technical grounds, I shall dismiss the bill, including the motion, without costs.

Solicitors for the plaintiff: Messrs. *Braikenridge*.

Solicitors for the defendant: Messrs. *Burt, Stevens, & Cave*.

[Law Reports, 15 Equity Cases, 69.]

C.J.B. Nov. 11, 1872.

* *Ex parte* NORTH WESTERN BANK. *In re* SLEE. [69]

Bankruptcy Act, 1869—Bills of Sale Act (17 & 18 Vict. c. 36)—Factors Act (5 & 6 Vict. c. 39)—Letter of Hypothecation—Equitable Charge—Bill of Sale—Pledge—Reputed Ownership—Notice of Act of Bankruptcy.

A, being a factor and warehouse keeper, by letter of hypothecation pledged to B certain wools to secure a sum of money. No delivery of the warrants for the

(1) Law Rep., 9 Eq., 845.

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wools was made, but a promise to deliver them on the following morning was added at the foot of the letter. After being pressed daily to deliver the warrants, A absconded. B thereupon obtained from A's clerk the keys of the warehouses and possession of the wools. A was a few days afterwards adjudicated bankrupt. The wools belonged to third parties, who had, however, been under advances from the bankrupt, and made no claim:

Held, that the letter created a good equitable charge; that it did not require registration under the Bills of Sale Act; that the goods were not in the order and disposition of the bankrupt; that the transaction was a valid pledge under the Factors Act; and that B had a good title against the trustee in bankruptcy.

THIS was an appeal from an order of the County Court judge at Liverpool, dated the 13th of August, 1872, directing the appellants, the North Western Bank, to deliver up to the trustee under the bankruptcy the keys and possession of certain premises or warehouses situate in Liverpool, and also certain wools, and to pay to the trustee his costs of and incidental to that application. It appeared from the evidence that the bankrupt Slee was a woolbroker, carrying on business in Liverpool, and also a warehouse keeper. He was also a customer of the North Western Banking Company, and was in the habit of borrowing money from the bank upon the hypothecation of wools as security for advances. On the 5th of April, 1872, the bankrupt, being in want of money, obtained from the bank £7000, he giving to them a letter in the following terms:

“Liverpool, April 5, 1872.

“To the North Western Bank, Limited.

“In consideration of your advancing to me (against bills to be got hereafter) the sum of £7000, say seven thousand pounds for two months, I agree to hold to the produce hereunder specified, as *trustee for you and as security for the same advance (with interest and commission), and to sell the same under your order, and pay to you the proceeds thereof as due, when received in or towards repayment of the said advance; and I further agree that I will, whenever you request me so to do, deliver the produce to you to enable you to sell the same, and apply the proceeds to the payment of the said advance. The property is fully insured by floating policies with the Royal, for the sum of £ , the policy for which I hold for your behalf.

“I am your obedient servant,

“Edwin Slee.”

To this letter was attached a schedule of the wools hypothecated, with columns in the schedule for the marks, the description, the classification, and value, and for a statement where the wools then were. The schedule, however, did not state where the wools were, nor was there any warrant attached; but at the foot of the letter there was a memorandum in these words: “Warrants for which I can lodge to morrow.” On the 6th of April (Saturday), Mr. Archibald, a bank clerk, ap-

plied to the bankrupt for the warrants, but Slee made some excuse, saying he would attend to the matter. On Monday, the 8th, and again on the 9th, further applications were made, but the warrants were not forthcoming. On the 10th the bank clerk again applied at Slee's warehouse, and was told that he was out of town, but would be back next day, and all would be right. On the 11th nothing was heard from Slee, except the receipt at his office of a telegram, dated that day, and addressed from the station at Derby, and which was in these words: "Am coming home, £7000 for the bank." This telegram was taken to the bank on the day it was received, and shown to the managers. Slee had, in fact, absconded, and nothing further has been heard of him up to this time, and it is supposed that he sent the above telegram to lull suspicion and gain more time to get away in safety. On the 12th Slee's brother, who had acted as his clerk, was sent for by the bank, and interrogated as to the bankrupt, and where he had gone. The reply given by the brother was, that he was in ignorance of the whole matter. On Saturday, the 13th, Slee's brother was again sent for, and had an interview with Mr. Arnold, one of the bank directors, who demanded the keys of the warehouses in *which the [71 hypothecated wool then was. As to the exact terms used in making the above demand, the evidence was somewhat conflicting; but there seems no doubt that the police-office was mentioned, and mentioned in connection with a refusal to deliver up the keys. In the course of the day the bank clerk, Archibald, obtained the keys, and the bank took possession of the warehouses in which the wools then were, and of the wools themselves. It however being considered possible, as it was known had been the case before, that Slee might return, the bank allowed the business to be carried on a few days longer; but on his not returning on the 19th of April a petition was filed, and on the 23d he was adjudicated bankrupt; the act of bankruptcy being, that he, being a trader, had departed from his place of business with intent to defeat and delay his creditors. The wools were not the property of the bankrupt, but had belonged to third parties, who, however, being under advances from the bankrupt, made no claim. The trustee under the bankruptcy claimed to have the keys and wool given up to him, which the bank offered to do on his undertaking that the wool should not be dealt with until their respective rights were ascertained. This the trustee refused to do, and on the case coming before the County Court judge, he made the order now appealed from.

Mr. *Benjamin*, Q.C., and Mr. *McConnell*, for the appellants, the North Western Bank: The dealings constitute an equitable charge in favor of the bank, and entitle them to be paid out of

the proceeds of the wool. The charge was made in the ordinary course of business, though the goods in question were not out and out the property of the bankrupt, and the title of the bank had not been perfected by delivery of the warrants; the cause was the fraud of the bankrupt, not the fault of the bank, and so the title of the bank under the Factors Act (5 & 6 Vict. c. 39) is good. The letter of hypothecation does not come under the Bills of Sale Act (17 & 18 Vict., c. 36), as the letter of hypothecation gives us no power to seize the wool, only a promise to grant possession; and by the 7th section such a letter is expressly excluded from the operation of the act. Neither is our [72] title bad under the reputed ownership clauses of the *Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), as though we never got the warrants delivered, yet we demanded possession of them from day to day, and were ultimately only defeated by the fraud of the bankrupt. Finally, there is no question but that the creditors have got the £7000 advanced by the bank, which, from the evidence of the books of the bankrupt, was paid away in the ordinary course of business, and, in the words of Chief Justice Erle, in the case of *Langton v. Waring* ⁽¹⁾ (an entirely analogous case to this), they claim to keep both the money and the goods. We submit that is not right, but that the bank is entitled to be paid the £7000 out of the proceeds of the sale of the wool.

Mr. *Gully*, for the trustee: The letter of hypothecation was clearly a declaration of trust, without transfer, within the meaning of the 7th clause of the Bills of Sale Act, and the words at the end of that clause limiting the application of the act are intended to apply to cases of ordinary transactions between merchants and business people, and are not intended to defeat declarations of trust without transfer, which are clearly bills of sale. Further, when the bank took possession of the goods, the bankrupt was absenting himself from his business, and they ought to have drawn the reasonable inference from the facts in their possession, which amounted to constructive notice of an act of bankruptcy: *Yate Lee on Bankruptcy* ⁽²⁾; and so could not perfect their inchoate title after such knowledge of the facts.

SIR JAMES BACON, C.J.: I think the case clearly one not only covered by authority, and a great deal more than covered, but that it is plain on the facts of the case itself. The learned judge of the County Court seems to have thought that the Factors Act (5 & 6 Vict. c. 39) created a difficulty in the way of the bank, for that it was doubtful whether the bankrupt had a right to hypothecate, or pledge, or deal with these goods in the manner he did. Upon the facts submitted, I cannot doubt that he had, under the act, full power to do so. That, therefore, I think dis-

⁽¹⁾ 18 C. B. (N.S.), 315.

⁽²⁾ Page 242.

poses of that question. To the argument that it came within the Bills of Sale *Act (17 & 18 Vict. c. 36), I am quite [73] unable to accede, because I do not think the Bills of Sale Act applies to the case at all. There is in the 7th clause a plain and careful exposition of what may be called the mercantile transaction of advance and pledge, but even if that were not so, the Bills of Sale Act relates to totally different transactions, creates different rights, imposes different duties, and it would be a perversion of the words, as it would be a total departure from the meaning, to say that such a transaction of advance and hypothecation amounted to a bill of sale, or that it had any analogy or relation to any such transaction. The learned judge seems to me to have taken that view of the case, because in a part of his judgment I find him saying this: "If the goods now in question had belonged to the bankrupt at the time of their hypothecation" (as for all purposes of hypothecation they no doubt did belong to him), "I should agree with Mr. Benjamin that the hypothecation might operate as an equitable charge, and that in that event the mode in which the bank actually obtained possession of the goods, the property in which had already passed to them by virtue of the letters of hypothecation, might not affect their equitable right to hold them as against the trustee as security for their loan." Now that, in my opinion, described the case with very perfect accuracy. The goods were, for the purpose of the transaction between the bankers and the bankrupt, his goods, and they were lawfully and honestly dealt with for the purpose of the advance. The mode in which the advance was made was in the ordinary course of trade, the engagements entered into by the bankrupt were complete, and the goods from that time were charged with the loan of, and became the property of, the bankers. I think, therefore, that neither under the Bills of Sale Act, nor under the Factors Act, can there be any valid objection made to the title of the bankers to take proceedings for them.

Then it is said that they were in the order and disposition of the bankrupt. But then there is another element to be considered, namely, whether they were so "with the consent of the true owner." If the bankers were the true owners of these goods until their advance was paid, what shadow of pretense is there for saying that there was any consent of the true owner? On the contrary, urgent demands were made by the bankers to have the terms of *the hypothecation completed [74] and nothing can be further from the fact, as appears by the case agreed on upon both sides, than saying that there was anything like consent on the part of the true owner. Then an attempt was made by Mr. Gully in his argument to say that they

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In re Chapman.

C.J.B.

had notice of the act of bankruptcy committed before they took possession. I do not think there is anything on which I can rely as leading to the inference of any such notice. When the bankrupt went away, and he had gone away before, his absence was not long, and the bankers were pacified by a telegram, the effect of which was, "I am coming home, and I have £7000 I am going to bring to pay you." They may have suspected that the bankrupt was dealing with their interests and his own in a very rash and reckless way by going away from Liverpool and spending his time at Derby; but that is far from giving to them notice that he had committed an act of bankruptcy by absconding with intent to defeat and delay his creditors. I think the case is reasonably clear, and that the bankers are entitled, under the letters of hypothecation, to that which they have claimed. With respect to the keys, I cannot take notice of the facts stated. I understand it is not disputed that, on the hearing before the learned judge, the bankers were prepared to give the trustees the keys upon the simple condition that they would not deal with the contents of the warehouse, so far as they were claimed by the bankers, until the rights claimed on each side had been judicially determined. That seems to me to be a very reasonable condition to impose. However, the trustee did not think fit to accede to that. I think the order must of necessity be discharged. I think the claim of the trustees was unfounded, and I think he should pay the costs in the court below.

Solicitors: Messrs. *Chester, Urquhart, Bushby & Mayhew*, for Messrs. *Laces, Banner, & Co., Liverpool*; Mr. *T. Bellringer*.

[Law Reports, 15 Equity Cases, 75.]

C.J.B. Nov. 18, 1872.

75]

*In re CHAPMAN.

Bankruptcy Act, 1868, s. 72—Bankruptcy Rules 1870, r. 260—Foreign Creditors—Actions in Foreign Courts—Jurisdiction—Injunction—Appointment of Receiver—Leave to appear and defend Actions.

A, a trader in London, being in difficulties, sent round a letter to his creditors, asking for indulgence; thereupon certain creditors in New York commenced actions in the New York Courts in respect of bills accepted, made payable, and dishonored in London to attach the debts due to A from various New York firms. A immediately filed a petition for liquidation, a receiver was appointed, and application made for an injunction to restrain the actions in the New York Courts: *Held*, that the court would not grant an injunction against the foreign creditors suing abroad.

THIS case came on upon motion, and was an application for an injunction to restrain certain proceedings which had been commenced in the Supreme Court of New York under the following circumstances: Mr. N. A. Chapman had for some time carried on an extensive business in the city of London, under

the style of John Fox & Co. Owing to heavy failures in New York he found himself, in the month of September, 1872, in such a position that it became necessary to make some statement to his creditors. Accordingly a letter was written and sent round by his solicitors to all his creditors, asking for indulgence until it could be ascertained accurately in what state his affairs then were. His books were immediately placed in the hands of Messrs. Cuydsill, Saffery, & Co., and an approximate statement was prepared, by which it appeared that the liabilities of the firm were about £116,000. These liabilities were principally in respect of bills accepted by Messrs. Fox & Co. on account of houses in the United States. A power of attorney was at once sent out to America to protect the interests of Messrs. Fox & Co. Several of the acceptances upon which Messrs. Fox & Co. were at that time liable had since been returned by the parties on whose account they were given, and the liabilities were thereby reduced to about £90,000. No further proceedings were taken by the creditors in England. The mail from America, which arrived in England on the 13th of November, brought Messrs. Fox & Co. notices that *certain American firms, being creditors [76 as holders of some of the bills had commenced proceedings in the Supreme Court of New York with a view to attach the debts due to Messrs. Fox & Co. from various New York houses. Messrs. Fox & Co. accordingly at once filed a petition for liquidation on the 15th of November. It appeared that the whole of the bills in respect of which proceedings were taken in New York, were sent over from New York to England for acceptance, were accepted in England, were made payable at London bankers, and were presented for payment and dishonored in London. An application was made on the 15th to Mr. Registrar Pepys, acting for the chief judge, for the appointment of a receiver, and an injunction, as stated above. The registrar appointed a receiver, but referred the application for an injunction to the chief judge.

The Hon. A. H. Thesiger, in support of the application: This court has power to grant an injunction in the case of a person domiciled abroad: *In re Tail & Co.* (1); *In re Distin* (2); *Earl of Oxford's Case* (3); *Maclaren v. Stainton*, and *Maclaren v. Carron Company* (4). The rule of American law is the same as that of England, that a discharge of a debtor in the American Courts is a discharge of him in every country (5), and the debts in respect of which these actions are being taken arose in this country; and in *Ellis v. M'Henry* (6), Chief Justice Bovill, who

(1) Law Rep., 13 Eq., 311.

(2) 26 L. J. (Ch.), 332.

(3) 24 L. T. (N.S.), 197.

(4) Story on the Conflict of Laws, 331-7.

(5) Wh. & T. L. C., 4th Ed., vol. ii., p. 632.

(6) Law Rep., 6 C. P., 234.

delivered the judgment of the court, said: "In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country." [He also referred to the Common Law Procedure Acts, 1852 and 1854, to show that the Courts of Common Law have power to grant injunctions against foreigners, and also to the Bankruptcy Act, 1869, and the Bankruptcy Rules, 1870, r. 260.]

77] *SIR JAMES BACON, C.J.: I do not think I can accede to this application. The cases I have been referred to draw a distinction between those in which injunctions may, and those in which they may not be granted by this court. In *ex parte Tail* ⁽¹⁾ the person against whom the injunction was granted had come in under an inspectorship deed, and having had his proof rejected, brought an action in the Irish courts in respects of his claim under the deed. In *In re Distin* ⁽²⁾ the plaintiff was resident in England, and there is no reason to doubt that it was within the power of the court to grant the injunction. In this present case an injunction, notwithstanding the Common Law Procedure Acts of 1852 and 1854, would be wholly ineffectual, and neither this court nor the Court of Chancery ever grants injunctions that will be wholly ineffectual. Farther, the equities upon which injunctions partaking of this nature are granted involve very delicate and nice questions, and I am warned by the words of the lord chancellor in *Ex parte Locke* ⁽³⁾, that the power of the injunction is not to interfere with any rights of the creditors, but only to protect the property of the bankrupt. The remarks I have made seem to me conclusive against granting this injunction, neither do I see any necessity for it, as a receiver has been appointed who will take possession of the goods; consequently, if the actions against the debtor should be successful, the creditors in New York cannot attach them, and they are safe so far as the power of this court can make them. Mr. Thesiger then asked the chief judge for leave for the receiver to appear and defend the action in New York by power of attorney given by the debtor.

SIR JAMES BACON, C.J.: The principle is right; but I must have more information as to the nature of these actions. I will, however, give you leave to apply to the registrar, and you must explain to him in detail what these actions are ⁽⁴⁾.

Solicitors: Messrs. Stocken & Jupp.

⁽¹⁾ Law Rep., 13 Eq., 311.

⁽²⁾ Law Rep., 6 Ch., 799.

⁽³⁾ 24 L. T. (N. S.), 197.

⁽⁴⁾ On application to the registrar leave was given.

[Law Reports, 15 Equity Cases, 79.]

M.R. Dec. 11, 1872.

*CARY v. HILLS.

[79]

[1872 C. 233.]

Administration — Plea that Defendant is not Executor.

To a bill alleging that the defendant is executor of a testator, and had, before probate, possessed himself of part of the personal estate, and praying for general administration, a plea that the defendant is not executor is a complete answer.

Rayner v. Koehler (?) not followed.

PLEA. The bill stated to the effect that Margaret Heard Lester, deceased, duly made and executed her last will, dated the 9th of December, 1869, whereby, after bequeathing certain specific legacies, she gave, devised, and bequeathed unto her executors thereafter named all her real and personal estate upon certain trusts; and she appointed the defendant, Octavius Lilburne Hills, and one James Alfred Hallett, executors; that the testatrix afterwards duly made and executed a codicil to the said will, dated the 6th of January, 1871, whereby, amongst other gifts, she bequeathed an annuity of £120 to the plaintiff, and made certain specific bequests in his favor; that the testatrix also made and duly executed a further codicil to her said will, dated the 29th of June, 1871, whereby, amongst other things, she bequeathed to the plaintiff a pecuniary legacy; that the testatrix died on the 9th of June, 1872; that James Alfred Hallett declined to accept *the trusts or to act as executor [80 of the said will, and had by deed poll disclaimed the trusts thereof; that the said will, and two codicils were duly proved by the defendant alone in the principal registry of Her Majesty's Court of Probate; that the testatrix was at the date of her decease entitled to certain personal estate therein specified, and, that the personal estate of the testatrix was sworn under the sum or value of £4000; that the testatrix was not at the time of her death seized of or entitled to any real estate; and that the debts of the testatrix amounted to the sum of £200 or thereabouts. The bill then alleged (paragraph 8) as follows: "The defendant, Octavius Lilburne Hills, shortly after the decease of the said testatrix, and before the grant of probate to him, took upon himself the duties of his said office of executor, and possessed himself of, and collected and got in or sold, a considerable portion of her said personal estate, and, amongst other items, her household furniture and other effects; and out of

(1) Law Rep., 14 Eq., 262; 3 Eng. Rep., 733.

the proceeds of such sales he paid divers debts of the said testatrix, and also her funeral expenses, amounting in the aggregate to £150, or thereabouts. The said defendant has furnished to the plaintiff no account of his said receipts and payments."

The bill then stated to the effect that the personal estate was likely to prove insufficient for payment in full of the legacies and annuities given by the will and codicils, and that questions were likely to arise with reference to the true construction of the will and codicils; and it prayed that the personal and (if any) the real estate of the testatrix might be administered under the direction of the court; and that all proper and necessary accounts might be taken, inquiries made, and directions given; and for further relief.

The defendant put in a plea, which, after averring that caveats had been entered in the Probate Court to prevent any person from proving the will or testamentary writings of the testatrix, proceeded as follows: "The aforesaid steps and proceedings in the said Court of Probate have prevented probate being obtained of the said will and testamentary writings of the said testatrix, or any of them, or the constitution of a legal personal representative of the said testatrix; and in consequence of the aforesaid steps and proceedings in the said Court of Probate, and in fact, 81] I have *not proved the said will or the codicils or testamentary writings in the said bill of complaint set forth, or other the testamentary writings of the said testatrix, or any of them, in the principal registry of her Majesty's Court of Probate, or elsewhere, or sworn the personal estate of the said testatrix under the sum or value of £4000, or under any other sum or value, or been constituted in any manner the legal personal representative of the said testatrix, and I am not, nor have I ever been, the duly constituted executor or legal personal representative of the said testatrix." The plea now came on for argument.

Mr. *Southgate*, Q.C., and Mr. *Fellows*, for the plea: The plea is a complete answer to the bill: *Hill v. Neale* ⁽¹⁾; *Cooke v. Gittings* ⁽²⁾. If the parts of the bill covered by the plea are struck out, the only allegation on which any relief could be granted would be that contained in paragraph 8; but the relief to which the plaintiff would be entitled upon that allegation would be, not general administration, but the appointment of a receiver *pendente lite*. In *Tempest v. Lord Camoys* ⁽³⁾ the bill was saved because it contained an allegation that the testator was entitled to real estate; but here the bill alleges that the testatrix was not entitled to any. In *Overington v. Ward* ⁽⁴⁾ it was held that a bill praying for a receiver *pendente lite* and for general administration

⁽¹⁾ 5 L. J. (O.S.), Ch., 144.

⁽²⁾ 21 Beav., 497.

⁽³⁾ 35 Ibid., 201.

⁽⁴⁾ 84 Beav., 175.

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was bad; and *De Feucheres v. Dawes* ⁽¹⁾ is a decision to the like effect. Some of the observations in *Raynor v. Koehler* ⁽²⁾ are adverse to our contention, but the decision is not, for the bill alleged that the testator was entitled to real estate. An averment that the defendant had not possessed himself of the estate as alleged in the bill would make the plea bad for duplicity. The decision in *Motion v. Moojen* ⁽³⁾ shows that the defendant has taken a proper course in filing this plea.

Sir R. Baggallay, Q.C., and Mr. Russell Roberts, for the plaintiff: It is not enough to say that if the parts of the bill covered by *the plea were struck out the bill would be demurrable; [82 and that is what the argument on the other side amounts to. The *ratio decidendi* in *Rayner v. Koehler* ⁽²⁾ governs this case. The decision in *Cooke v. Gittings* ⁽⁴⁾ may be accounted for on the ground that the bill in that case did not aver that the defendant took possession of the personal estate before probate.

LORD ROMILLY, M.R.: This plea must be allowed. You cannot administer the personal estate of a testator in Chancery unless you have his legal personal representative before the court; if you were able to do so you would work great injustice. If at the hearing of an administration suit the court finds that it has not the legal personal representative of the testator before it, then its arm is paralyzed, and it can do nothing. This plea in substance says that there is no legal personal representative of the testatrix, and indeed it is not alleged, or even suggested, that any person other than the defendant has been constituted her legal personal representative. It is true that the bill alleges that the defendant has possessed himself of some part of the personal estate; but if he had possessed himself of every penny, that would not entitle the plaintiff to the relief he asks. If a person has taken possession of the estate, you may file a bill for a receiver to take care of the property until a legal personal representative is appointed, and the court will appoint a receiver for that purpose; but that is a totally different thing from making a decree for general administration. I must therefore allow this plea.

Sir R. Baggallay asked for leave to amend.

LORD ROMILLY, M.R.: No; the plea goes to the whole bill.

Solicitors: Messrs. Ravenscroft & Hills; Messrs. Rooks, Kenrick, & Harston.

(1) 34 Beav., 175.

(2) Law Rep. 14 Eq., 262.

(3) Law Rep. 14 Eq., 202.

(4) 21 Beav., 497.

(5) In *Coots v. Whittington*, 29 Law

5 ENG. REP.]

Times Rep. (N.S.), 206, L. R., 16 Eq., 534, to appear in 6 or 7 Eng. Rep. *Rayner v. Koehler*, *supra*, was followed by Vice Chancellor Malins and the principal case of *Cary v. Hills* disapproved of.

[Law Reports, 15 Equity Cases, 86.]

V. C. W. November 19, 20; December 4., 1872.

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*PRYSE v. PRYSE.

[1872 P. 77.]

Special Case Act, 13 & 14 Vict. c. 85—Jurisdiction—Fictitious Statements in Case.

On a special case raising questions of legal limitations at the instance of a plaintiff not in possession, the court declined to make any order or to entertain any fictitious question as to title deeds or accounts in order to found jurisdiction.

Key v. Key (¹), observed on. *Forsbrook v. Forsbrook* (²) distinguished.

SPECIAL CASE. Daniel Bowen, by his will, dated the 3d of September, 1846, devised certain estates in the county of Cardigan as follows: "To the use of my sister Anne W. Philipps and her assigns during her life, and from and after her decease to the use of all or any one or more exclusively of the other or others of the children of the said A. W. Philipps now living or hereafter to be born, in such parts or for such estate as the said A. W. Philipps by any deed, with or without power of revocation, or by her will or any codicil thereto, whether sole or married, and notwithstanding her present or any future coverture, appoint, and in default of and in the meanwhile and until such appointment, and subject thereto and to the estates to be appointed, to the use of the respective daughters of A. W. Philipps in equal shares for their respective lives, and as to the share of each daughter of A. W. Philipps, on the decease of each such daughter to the use of the respective first and other son and sons of her body successively one after another in order of priority of birth, and the heirs of his and their respective body and bodies; and in default of such issue, to the use of the respective daughters and daughter of each such niece, and the heirs of the body and respective bodies of such respective daughters and daughter, in equal shares as tenants in common in tail general, with cross remainders between them in tail general, and if all such daughters of each such niece but one shall die without issue, or there shall be but one such daughter, to the use of such surviving, remaining, or only daughter, in tail general; and in default of such issue, to the use of the others and other of my 87] said niece's *daughters and daughter of A. W. Philipps respectively, in equal shares if more than one, and if but one, to such one for the same estates and with the same subsequent limitations to their respective sons and daughters, and including this cross limitation, as are herein expressed concerning

(¹) 4 D. M. & G., 73.(²) Law Rep., 3 Ch., 93.

their original shares." As to the same hereditaments, on failure of all the limitations therein before expressed, the testator, by his will, declared that they should remain and be for the use of the second and other sons (except her eldest son) of Jane Lloyd successively for life, with divers remainders over.

Daniel Bowen died in 1847, and his will was duly proved by his executors on the 31st of December of the same year. Soon after his death his sister, A. W. Philipps, entered into possession of the devised estates, and continued in possession till her death in February, 1848. A. W. Philipps had only one son, who died an infant, and three daughters only — Bridget Jane, who in 1853 married C. A. Harries; M. A. Philipps, who in 1844 married J. P. V. Pryse; and E. F. L. Philipps, who in 1831 married F. L. Philipps.

Neither Bridget Harries nor E. F. L. Philipps had any children. A. W. Philipps never executed any deed by way of exercising the power contained in Daniel Bowen's will, but by her will dated the 24th of November, 1847, she made the following disposition: "I, A. W. Philipps, now the wife of John W. Philipps, of N., being of sound mind, do make my last will and testament in manner following, that is to say, In pursuance and exercise of the power of appointment and authority given me under and by virtue of the last will and testament of my late brother Daniel Bowen, do hereby, by this my will, give and devise the house and garden in Newcastle Emlyn, Carmarthen, to my daughter E. F. L. Philipps, her heirs and assigns for ever. Also I give and devise Bwlchlrychan, in the parish of Llanwenog, to my second daughter, Mary Ann Pryse, the wife of J. P. Pryse, for and during the term of her natural life, and from and after her decease I give such portion thereof as shall be selected by the said J. P. Pryse, either before or immediately after the decease of the said Mary Ann Pryse, of the value of £200 per annum, for and during the term of his natural life; and from and after his decease I give the same to the person entitled to the other part of the said estate; and as to the said portion of my said freehold property as is situated in *the [88 parish of Llanwenog, my will is, and I hereby devise the same, together with what shall be selected by my son-in-law J. P. Pryse, for life unto the heirs of the body of my said daughter Mary Ann lawfully begotten as she shall by her last will or deed appoint notwithstanding her coverture; and in default of such appointment I give the same to the first and other son or sons of my daughter Mary Ann, his and their heirs, and for want of issue male of her body, I give and devise the same to the daughters or daughter of my said daughter Mary Ann as tenants in common, and for want of such daughter, then I give all my

said estate in the said parish to my surviving daughters, Bridget Jane and Elizabeth Frances, as tenants in common, and the heirs of their respective bodies; and for want of issue of either of my said (three) daughters, Bridget Jane, Mary Ann, or Elizabeth Frances, I give the same to be disposed of by the survivor of my said three daughters, and for want of the survivor of them making such disposition, I give my said estate to my own right heirs for ever.

A. W. Philipps died in February, 1848, without making any other disposition. Upon her death her daughter Mary Ann Pryse, and her husband entered into possession and into the receipt of the rents and profits of the said hereditaments. Mary Ann Pryse died in June, 1851, having had only one child, the plaintiff, Mary Ann Emily Jane Pryse, who at the time of her death was about two years of age. Mary Ann Pryse made no appointment, and left her husband her surviving, who immediately entered into possession of the estate, and claimed and now claims to hold it as tenant by the courtesy if his wife were tenant in tail, and if not he claimed and claims a portion of it to the value of £200 a year during his life. On the 7th of May, 1870, the daughter of Mary Ann Pryse attained the age of twenty-one, and was desirous of barring the estate tail created or supposed to have been created by the will of A. W. Philipps. Questions having arisen as to the rights of the parties, this case was submitted for the opinion of the court: 1. First, whether under the wills of Daniel Bowen and A. W. Philipps, Mary Ann Pryse was tenant in tail or tenant for life in the said estates. 2. Whether, if Mary Ann Pryse was only tenant for life, the gift of a portion of the estate and the value of £200 per annum to 89] the husband of Mary Ann Pryse was valid. *3. Whether, if under the will of A. W. Philipps an estate for life only was devised to Mary Ann Pryse, the ulterior appointments were wholly or partially, and if partially to what extent, well appointed, or whether they were, or any and which, null and void. 4. Whether, if an estate for life only was by the will of the said A. W. Philipps devised or appointed, the plaintiff, on her mother's death, became, under the will of A. W. Philipps, entitled to an estate in inheritance in fee simple in the said estate, or for an estate tail, or whether she became entitled to an estate tail in one undivided third part of the said estate under the will of Daniel Bowen, each of the sisters of Mary Ann Pryse, viz., Bridget J. Harries and E. F. L. Philipps, being entitled to one other third part thereof, with remainder to the use of their first and other sons successively in tail male, and in default of such issue remainder to the daughters.

On the case being opened, The VICE CHANCELLOR said:

These are all legal questions, and I must require you to satisfy me that they are within the jurisdiction of this court.

Mr. *Lindley*, Q.C., and Mr. *Macnaghten*, for the plaintiff: In *Key v. Key* (*) the court decided similar questions without objection; but even if the court felt a difficulty on the point of jurisdiction, it could direct an amendment, as was done in *Forsbrook v. Forsbrook* (*), so as to bring the case within the act. In that case the equitable question suggested was whether the first takers had power to commit waste. Here a question as to the custody of the title deeds, or of the plaintiff's right to an account, might naturally arise from the relation of the parties.

Mr. *Dickinson*, Q.C., Mr. *E. G. White*, and Mr. *G. W. Collins*, appeared for Mr. and Mrs. Philipps. They said that all the parties desired the opinion of the court to be taken. In *Key v. Key* the question of jurisdiction was raised and got over (but how, he (Mr. Dickinson) did not remember), and therefore was not referred to in the report. The report showed that the court must have had the facts before them, and could not have decided in ignorance that a question of jurisdiction was involved in the case. They cited *De Windt v. De Windt* (*).

*Mr. *Joshua Williams*, Q.C., and Mr. *C. Hall*, for other parties, said, that in addition to the question of title deeds and accounts, there was a further one, whether the plaintiff was not bound to execute a settlement.

The VICE CHANCELLOR: I feel great difficulty on the subject of jurisdiction; but the case may be argued.

The case was then argued at considerable length, when his honor reserved his judgment.

Dec. 4. SIR JOHN WICKENS, V.C.: The plaintiff in this case, a lady who has recently attained her majority, asks the court to decide that she is legal tenant in tail of certain estates in Cardiganshire in remainder expectant on the determination of a legal interest in her father as tenant by the courtesy, or, in the alternative, that she is legal tenant in fee simple or fee tail in possession of those estates, or lastly, that she is legal tenant in fee of and in possession of one undivided third part of them. The plaintiff's father has been in undisturbed possession of the property since her mother's death, in June, 1851. According to the ordinary rule this court will not decide a legal question as to a right to real estate in remainder, and will not try the legal title to real estate in possession of a person who is out of possession. Both propositions are elementary. As regards the former, *De Windt v. De Windt* was referred to during the argument as giving the highest sanction to what was said in *Green-*

(*) 4 D. M. & G., 73.

(*) Law Rep., 3 Ch., 93.

(*) Law Rep., 1 H. L., 87.

mood v. Sutherland ⁽¹⁾ and *Garlick v. Lawson* ⁽²⁾. But in fact no authority is required for either. It is said that the court is asked to do no more here than was done in *Key v. Key* ⁽³⁾, and by means of an artifice suggested by the court in *Forsbrook v. Forsbrook* ⁽⁴⁾. If *Key v. Key* be law, the amendment in *Forsbrook v. Forsbrook* seems to have been unnecessary, so that the cases are not quite consistent. And notwithstanding my unfeigned respect for the judges who decided *Key v. Key*, and notwithstanding the fact which, though not appearing in the report, was stated to me by Mr. Dickinson, that the point was 91] considered, I must decline to follow it, as *regards the question of jurisdiction, in any case not similar, which this is not. In *Forsbrook v. Forsbrook* ⁽⁴⁾ it was held that a person in possession under a legal title (so far as appears) might obtain the opinion of the court on a special case, whether he could commit waste or not, which in that case involved the question whether he was tenant for life or in tail. This determined, contrary to the common opinion (and I believe to the intention with which the Special Case Act was framed), that the court can decide on a special case a question which could not be determined in a suit by the plaintiff against the defendant named in the heading, and also decided that waste is a matter cognizable by courts of equity within the meaning of the Special Case Act.

No doubt courts of equity, for the purpose of administering assets, and generally in taking accounts, try many different sorts of action, and for the purpose of granting or refusing injunctions try numerous cases of trespass and the like, as they may incidentally, and for the purpose of exercising their proper jurisdiction, try questions of Ecclesiastical or Scotch or Italian law; but the Special Case Act cannot have been meant to extend to these. No doubt by "questions cognizable in courts of equity" it meant primarily, if not exclusively, equitable questions. At the same time waste, if not an equitable question, is one which often arises in courts of equity, and what the court did in *Forsbrook v. Forsbrook* was so convenient and just that its authority will, no doubt, be recognized in any case at all similar, at least by any tribunal except the highest. It is as yet, I believe, a single case, unless *Key v. Key* ⁽³⁾ be considered as involving the same principle. It has been already suggested that the two cases are not altogether consistent. Where a new jurisdiction is given by statute the court cannot go beyond it on grounds of convenience. And whereas, as in the statute now in question, the obvious intention is merely to simplify, for certain purposes, the power of a court of recognized jurisdiction, it can hardly be right for that court to twist the act into an instrument for claim-

10 Hare, App., xil.
(1) *Ibid.*, xiv.

(2) 4 D. M. & G., 73.
(3) Law Rep., 3 Ch., 93.

ing a more extended jurisdiction or diverting to itself the jurisdiction properly belonging to another. Still the authorities seem to show that within certain limits the court may be ingenious in seeking grounds to give itself jurisdiction under this particular act, where the principal question is *one which [92 it cannot directly deal with; and I was asked to apply some similar process for the purpose of acquiring jurisdiction by a sidewind over questions which I have no right to decide directly. First, it was faintly suggested that the plaintiff may be entitled to an account against her father as *quasi* bailiff during her minority. But her principal contention is, that his possession was rightful. And on the alternative contention, which she in effect repudiates, her title is a title to eject, and nothing else, though she would be entitled to an account if she had established her title in ejectment. It was further suggested that she has an interest in the title deeds. No doubt any remainderman having a vested interest has certain rights to the title deeds which may be asserted by bill: *Davis v. Earl of Dysart* ⁽¹⁾; but such a bill raises a question between tenant for life and the remainderman only, and even if it were maintainable where the remainderman's title is open to doubt, it cannot be used to determine questions between adverse remaindermen. Still less could a bill founded on an alleged title to deeds be made to serve the purposes of an ejectment, which is the plaintiff's alternative title. It should be added that in this case there is not a word to show whether there are deeds or who has them. If the court, for the purpose of asserting jurisdiction, suggested facts to be stated or questions to be asked, there would be some danger of its having fictitious cases brought before it; and to this there would be a very strong objection on many grounds. I have no reason to believe that there was any real question as to the deeds in this case, and in fact am convinced that there is none.

On the whole, I can see no ground for assuming the jurisdiction to answer the questions raised by this case; and though I have heard them fully argued, and have formed a strong opinion upon them, I shall do as the Lord Justice Turner did in *Bulkely v. Hope* ⁽²⁾, and abstain from expressing it. Probably the best way will be to say, as was done there, "This court does not think fit to make any order in this case."

Solicitors: Messrs. *Lempriere, Turner, & Clayton*, agents for Mr. *Walter Owen Price*, Carmarthen.

⁽¹⁾ 20 Beav., 405.

⁽²⁾ 8 D M. & G., 30.

See New York Code, sec. 372. The case agreed upon and submitted must be an actual case submitted in good faith and not a fictitious one. *Williams*

v. City of Rochester, 2 Lansing, 169. And there must be an existing cause of action by one of the parties against the other *Hobart College v. Fitzhugh*, 27 N. Y Rep., 136.

[Law Reports, 15 Equity Cases, 93.]

M. R. Dec. 6, 10, 1872.

93] *LONDON, BOMBAY, AND MEDITERRANEAN BANK V.
NARRAWAY.

[1871 L. 18.]

Set-off — Mutual Credit — Bankruptcy Act, 1849, s. 171 — Credit given to Firm — Bankruptcy of Partner — Party claiming Set-off Trustee only.

The plaintiff Bank sold acceptances of theirs to C & Co. partly in consideration of acceptances of C & Co. The firm of C & Co. consisted of two partners, both of whom in 1866 executed assignments for the benefit of their separate creditors, one of which assignments was registered under the Bankruptcy Act of 1861, but the other was not; and the partnership affairs were afterwards wound up in a chancery suit. At the time, when these assignments were executed the acceptances of C & Co. were not due and were in the hands of third parties, who afterwards re-assigned them to the plaintiff Bank, in order that the plaintiff Bank might establish a set-off against C & Co.; and it was agreed that any moneys recovered by means of the set-off should be divided between the plaintiff Bank and the holders of the acceptances in certain proportions:

Held, that as there was no bankruptcy of the firm of C & Co., the plaintiff Bank were not entitled to set off the acceptances of C & Co. against the acceptances of the plaintiff Bank.

Seemle, that the plaintiff Bank were only in the position of trustees of the acceptances of C. & Co., and on that ground also were debarred from claiming a set-off.

PREVIOUSLY to August, 1866, Bomanjee Pestonjee and Bomanjee Framjee Cama carried on business in London under the firm of Bomanjee Framjee Cama & Co. (hereafter called Cama & Co. of London); and Bomanjee Framjee Cama carried on business in Bombay on his own account under the style of Bomanjee Framjee Cama, Sons, & Co. (hereafter called Cama & Co. of Bombay). In January, 1866, the Bombay branch of the plaintiff Bank sold to Cama & Co., of Bombay ten bills of exchange for £1000 each, drawn upon the plaintiff Bank, and payable at their principal office in London three months after sight; and Cama & Co. of Bombay delivered to the manager of the said Bombay branch two bills of exchange for £5000 each drawn by Cama & Co. of Bombay on Cama & Co. of London, and payable six months after sight. All these bills were duly 94] accepted. The plaintiff Bank's acceptances *became due on the 23d of May, 1866; and those of Cama & Co. of London on the 23d of August, 1866. In February, 1866, the Bombay branch of the plaintiff Bank sold to Cama & Co. of Bombay certain other bills for sums amounting in the whole to £15,000, drawn on the plaintiff Bank, and payable four months after sight. These bills were duly accepted, and ten of them, being for £1000 each, became due on the 11th of July, 1866, and two, being respectively for £3000 and £2000, became due on the 29th of July, 1866. In consideration for the last mentioned

bills Cama & Co. of Bombay paid the sum of £5000 in cash, together with a further sum in respect of exchange, and they also delivered to the manager of the Bombay branch two bills for £5000 each drawn by Cama & Co. of Bombay on Cama & Co. of London, and payable six months after sight. These bills were duly accepted by Cama & Co. of London, and became due respectively on the 11th and 29th of September, 1866. The plaintiff Bank were unable to meet those acceptances which fell due on the 23d of May, 1866, and on the 1st of June, 1866, a memorandum of agreement between Cama & Co. of London and the plaintiff Bank was signed, whereby it was agreed that a promissory note of Messrs. E. Landau & Co. for £10,000, held by the bank, should be deposited with Cama & Co. of London as a security for payment of the bank's overdue acceptances for £10,000 (then held by Cama & Co.) by the following installments, with interest at the minimum rate of the Bank of England, from the 23d of May, 1866, that is to say, £5000 on or before the 20th of June, 1866, and the balance on or before the 27th of July, 1866; the promissory note to be returned to the bank on due payment of such installments, but in default of payment of either of such installments the promissory note was to belong to Cama & Co. of London absolutely, who were, however, to account to the bank for any balance that might remain after payment of the said acceptances, and all interest and legal and other expenses that might be incurred in obtaining payment of the installments, or the moneys due on the promissory note. Default was made in payment of the installment of £5000 on the 20th of June, 1866.

On the 20th of July, 1866, an order was made on a petition *presented on the 7th of the same month directing the [95 plaintiff Bank to be wound up. By a deed dated the 6th of August, 1866, Bomanjee Framjee Cama conveyed all his real and personal estate to John Beattie, James Hossack, and Dadabhoj Hormusjee Cama, their heirs, executors, and administrators, upon trusts for the benefit of the creditors of Bomanjee Framjee Cama. This deed was not registered under the Bankruptcy Acts. By a deed dated the 22d of August, 1866, Bomanjee Pestonjee conveyed all his estate and effects, and particularly his share or interest in any partnership or firm, and the assets thereof (except his interest in certain premises at Bombay), to William Frederick Narraway and Robert Davie Peebles, to be got in, applied, and administered for the benefit of his creditors, as if he had at the date thereof been adjudicated bankrupt. This deed was registered under the Bankruptcy Act, 1861, and Robert Henry Nesbitt was afterwards appointed a trustee thereof in the place of Robert Davie Peebles.

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In January, 1868, a bill was filed by Narraway and Nesbitt against Beattie, Hossack, Dadabhoi Hormusjee Cama, and Bomanjee Framjee Cama, for the purpose of obtaining a declaration that the partnership of Cama & Co. of London had been dissolved, and of taking the accounts and winding up the affairs of the firm; and a decree was made in this suit. At the date of the order to wind up the plaintiff Bank, and of the creditors' deeds executed by Bomanjee Framjee Cama and Bomanjee Pestonjee respectively, the firm of Cama & Co. of London were the holders of the plaintiff Bank's said acceptances to the extent of £17,000; Messrs. Gray, Dawes, & Co. were holders thereof to the extent of £4000; Messrs. Browne, Hunter, & Co. to the extent of £2000; and the Bank of England to the extent of £2000; the National Provincial Bank were the holders of one of Cama & Co.'s said acceptances, and the Union Bank of London were the holders of the remaining three. An agreement dated the 12th of November, 1869, was made between the Union Bank of the first part, the National Provincial Bank of the second part, Gray, Dawes, & Co. of the third part, Browne, Hunter, & Co. of the fourth part, and the official liquidators 96] *of the plaintiff Bank of the fifth part, by which it was, amongst other things, agreed to the following effect: 1. That the Union Bank and the National Provincial Bank should forthwith deliver (and if necessary endorse, but without recourse) those which they respectively held of Cama & Co.'s acceptances for £20,000, to the plaintiff Bank or the official liquidators; and the official liquidators should immediately afterwards take such steps and proceedings as might be necessary for setting off a sufficiency of the same against the plaintiff Bank's acceptances, and recovering possession of Landau's promissory note; and for the purpose of such set-off the official liquidators should make use of, or as between the parties thereto should be deemed to have made use of the acceptances of Cama & Co. held by the Union Bank, by the National Provincial Bank, ratably and in the proportion of three to one. 2. That all costs of and incidental to the taking of the said steps and proceedings should (whether the same should be wholly or partially successful or not) be borne by the estate and effects of the plaintiff Bank. 3. That if the official liquidators should fail to establish the said set-off and to recover Landau's promissory note, Cama & Co.'s acceptances should be delivered (and if necessary re-endorsed) by the official liquidators to the Union Bank and the National Provincial Bank respectively, and all the parties thereto should be restored, as far as circumstances would permit, to the same rights and liabilities as they respectively would have possessed and been subject to if the present agreement had not been made

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and executed. 4. That if the said set-off should be established or effectuated, and as a consequence thereof Landau's promissory note wholly or partially released from the claims of Cama & Co. of London and of Bombay, and of their respective representatives or assigns, the net proceeds so released of such promissory note should be disposed of as follows: There should be paid out of the said net proceeds to the Union Bank, in consideration of the delivery and of the endorsement (if any) to be made by them pursuant to the first article, a dividend at the rate of 5s. in the £1 on the amount of the said acceptances held by them, and there should be paid out of the said net proceeds to the said National Provincial Bank, in consideration of the delivery and of the endorsement (if any) to be made by them pursuant to the first article, a dividend at the like *rate of 5s. [97 in the £1 on the amount of the said acceptance held by them; and there should be paid out of the said net proceeds to Gray, Dawes, & Co., in consideration of their concurring in the agreement and thereby facilitating the making of the set-off, a dividend at the rate of 2s. 6d. in the £1 on the bills held by them, and there should be paid out of the said net proceeds to Brown, Hunter, & Co., in consideration of their concurring in the agreement, and thereby facilitating the making of the said set-off, a dividend at the rate of 2s. 6d. in the £1 on the bill, all of the aforesaid payments to abate ratably in the event of the said net proceeds proving insufficient to provide for all of them in full; and as to the residue of the said net proceeds (which it was estimated might in the event amount to £4,250 or upwards) the same should become and be part of the general estate of the plaintiff Bank, and be disposed of accordingly. Meanwhile proceedings had been taken by Narraway and Nesbitt against Messrs. E. Landau & Co. to recover the amount of the promissory note. These proceedings were resisted by Landau & Co. on the ground that they ought not to be called upon to pay the note until they were released from being contributories of a company which had been amalgamated with the plaintiff Bank. Narraway and Nesbitt thereupon applied to the liquidators of the plaintiff Bank to release Landau & Co., but they refused to do so, and on the 19th of February, 1870, wrote a letter, which, after stating that the plaintiff Bank claimed to set off the acceptances of Cama & Co. against their own, concluded as follows: "As the Bombay bank has not yet had time to establish the proposed 'set-off' its liquidators are naturally anxious to retain those names on the lists for the present in order that Cama's inspectors may in the meantime be prevented from realizing the note or the securities which are deposited to meet it; but should the bank be successful in establishing such set-off an application will be made to the court

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to sanction the removal of such names." Subsequently Messrs. Narraway and Nesbitt succeeded in recovering from Landau & Co. a considerable portion of the moneys due on their promissory note, and such moneys were paid into court in the suit of *Narraway v. Beattie* pursuant to an order dated the 7th of December, 1870.

98] *On the 31st of January, 1871, the bill in this suit was filed against all the parties to the suit of *Narraway v. Beattie*, alleging that the plaintiff Bank were the holders of all the four bills of Cama & Co. for £5000; and that at the time when the plaintiff Bank became such holders the moneys due on the note had not been recovered; and praying for declarations, 1, that the plaintiff Bank were entitled to redeem the promissory note of Landau & Co., and all moneys received in respect thereof on payment of the balance, if any, due from the bank to the firm of Cama & Co. of London; 2, that for the purpose of ascertaining the amount of such balance, the sums due to the bank from Cama & Co. of London in respect of the bills of exchange accepted by the firm and held by the bank ought to be set off against the sums due from the bank to the firm in respect of the bills of exchange accepted by the bank and held by the persons representing the firm; for relief on the footing of these declarations; and for an injunction to restrain the defendants from dealing with the moneys recovered on the promissory note. The nature of the arrangement under which the bank became holders of the acceptances of Cama & Co. did not appear in the bill, and was only discovered upon the cross examination of one of the liquidators of the bank. The suit now came on to be heard.

Mr. Fry, Q.C., and Mr. H. Lake, for the plaintiffs: We claim a right of set-off under the mutual credit clause of the Bankruptcy act of 1849 (12 & 13 Vict. c. 106, s. 171), which was in force at the time when the transaction took place. In *Hankey v. Smith* (1) it was decided that mutual credit may be constituted though the parties do not mean particularly to trust one another; and the provisions of the then Bankruptcy Act (which were substantially the same as those of the act of 1849) were held to apply to a case where A accepted a bill, which got into the hands of B, who afterwards bought goods of A. This is a stronger case; for the bills accepted by Cama & Co. of London were given as consideration for those accepted by the plaintiff Bank. It is 99] *true that the bank parted with the bills, and that they were in the hands of third parties at the date of the bankruptcy; but the effect of that was the only to suspend the right of set-off, not to extinguish it; and as the bills were, at the

(1) 3 T. R. 507, n.

time when the promissory note was realized, and still are, in our hands, the right of set-off has revived: *Bolland v. Nash* ⁽¹⁾; *Collins v. Jones* ⁽²⁾. Further, we are not mere trustees of the bills returned to us, but have a beneficial interest in the result of the set-off; and there is nothing illegal or improper in the arrangement which has been made with the parties entitled to these bills. In *Hawkins v. Whitten* ⁽³⁾ a person indebted to a firm of bankers took their notes after he knew that they had stopped payment; but it was held that he was entitled to set them off; and Bagley, J., in delivering the judgment of the court, observed: "It may be true that he took these notes for the very purpose of making them the subject of his set-off and of getting in substance 20s. in the pound upon these notes; but as this has not been prohibited, we cannot say that it is illegal."

Sir R. Baggallay, Q.C., and Mr. H. M. Jackson, for *Narraway* and *Nesbitt*: First: The right of set-off claimed by the plaintiff arises only in the case of a bankruptcy; and we say that there has been no bankruptcy here. There has been no bankruptcy of the firm of Cama & Co. of London; and as regards the individual partners, only one of them has executed a registered deed; the other has simply parted with his interest. That alienation effected a dissolution of the partnership, and accordingly a suit was instituted, a decree was made declaring the partnership dissolved, and the affairs of the partnership have been wound up in that suit; but there has neither been a bankruptcy of the firm nor anything equivalent to it. There is nothing in the Companies Acts equivalent to the mutual credit clause in the Bankruptcy Acts. Secondly: The terms of the memorandum of agreement of the 1st of June, 1866, preclude the plaintiff Bank from claiming a set-off, at all events to the extent claimed. That agreement was *entered into [100 after the plaintiff's acceptances had become due, and at a time when the plaintiff Bank might have been sued on them. The object of the agreement was to benefit the plaintiff Bank, who were desirous of obtaining time from Cama & Co. It provides for payment of the acceptances by installment; and the stipulation made was, that if an installment was not paid, the promissory note in question was to become the absolute property of Cama & Co. of London, subject to a right in the plaintiff to require them to account for any surplus which might remain after payment of the acceptances and costs. That right is the only one which the plaintiff can enforce; and the set-off can be claimed only to the extent of that surplus, if at all. Thirdly: Assuming the agreement of the 12th of November, 1869, to be one which the court will recognize, still the plaintiff Bank can

(1) 8 B. & C., 105.

(2) 10 B. & C., 777.

(3) 10 B. & C., 217.

at most have a set-off only to the extent to which they are beneficially interested in Cama & Co.'s acceptances: *Foster v. Wilson* ⁽¹⁾. Fourthly: In reality, however, the whole arrangement carried into effect by the agreement of the 12th of November, 1869, is a mere juggle, which a court of equity will not assist in any way. This is made perfectly plain by the letter from the liquidators of the 19th of February, 1870. The plaintiff Bank have really no beneficial interest in the acceptances, but are only trustees or agents for the real owners, who have placed the acceptances in their hands simply with a view to this suit, and upon the terms that the plunder to be thereby obtained shall be shared between them. Upon the principles laid down in *Foster v. Wilson* there can be no set-off at all. In questions relating to set-off courts of law now look at the real position of the parties: *Watson v. Mid-Wales Railway Company* ⁽²⁾; *à fortiori*, a court of equity will do so.

Mr. Southgate, Q.C., and Mr. Kekewich, for Beattie and Hossack, referred to *Fair v. McIver* ⁽³⁾.

Mr. Fry, in reply.

[101] *LORD ROMILLY, M.R., after stating the facts, continued: The facts which I have stated show that it is impossible there can be such a thing as set-off in respect of mutual credit in this case. In the first place, there is no bankruptcy of the firm of Cama & Co. of London. There is not even a registration in bankruptcy of a creditors' deed, except of one of the partners; as regards the other, there is only an assignment to trustees, which has never been registered; and with respect to the winding-up, the question of mutual credit does not arise. In that state of the case the plaintiffs come and ask for the benefit of the 171st clause of the Bankruptcy Act, 1849, and they contend, that though a bill may have gone out of their hands, they do not lose the right which exists at the time of the bankruptcy if they can get the bill back again. It is admitted that they did not hold the bills at the time of the bankruptcy: more than that, it is quite plain that they are not now the beneficial holders of them: they are only entitled to them for certain purposes as trustees, and the case of *Fair v. McIver* ⁽³⁾, which has been referred to, appears to me a distinct authority upon that point. [His lordship read the marginal note.] It also appears that these acceptances were not due at the time when the partners in Cama & Co. executed these assignments. The result is, that in my opinion there is no ground for contending that the right of mutual set-off arose. There was in point of fact a bankruptcy only with respect to the separate estate of one of the traders,

⁽¹⁾ 12 M. & W., 191.

⁽²⁾ Law Rep., 2 C. P., 503.

⁽³⁾ 16 East, 130.

and that does not entitle the official liquidators of the plaintiff company, who are now being wound up, to claim the benefit of that clause of the statute from which I am of opinion they are barred in every way. I must therefore dismiss the bill with costs.

Solicitors : Messrs. *Lewis, Munns & Longden* ; Messrs. *Uptons Johnson, Upton & Budd* ; Messrs. *Waller & Handson*.

[Law Reports, 15 Equity Cases, 104.]

V.C.M. Dec. 17, 1872.

ROCK v. LAZARUS.

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[1872 R. 145.]

Copyright — Engraving — Name of Proprietor — Trading Name of Firm — 8 Geo. 2, c. 13, s. 1.

Where prints, engravings, and similar articles are the property of a trading firm, the proprietorship is sufficiently designated for the purpose of obtaining the protection of the Copyright of Designs Acts, by printing upon them the trading name of the firm, even though it does not contain the names of all the partners in the business.

THIS was a motion to restrain the defendants from infringing the copyright claimed by the plaintiffs in certain prints or engravings. The bill stated that in and previously to the month of May, 1859, the plaintiffs, whose names were William Frederick Rock and John Payne, carried on the business of wholesale and fancy stationers, in partnership with Mr. Henry Rock and Mr. Richard Rock, at 11, Walbrook, in the city of London, under the firm of "Messrs. Rock & Co.," as well also as "Messrs. Rock, Brothers, & Payne," and that they continued so to carry on the business down to the death of Henry Rock, which occurred in July, 1868, and that from that time the plaintiffs and Richard Rock continued to carry on the business in partnership at the same place and under the same firms down to the death of Richard Rock, which took place in January, 1871, and that since then the plaintiffs had continued to carry on the same business in partnership at the same place and under the same firms. It further stated that all the property in the successive partnerships, including the property and rights in the plates, engravings, and prints mentioned in the bill, were now vested in the plaintiffs alone for their own benefit.

The engravings which the bill sought to restrain the defendants from imitating consisted of a series of seven views of the town of Great Yarmouth, which were printed either separately on distinct sheets of paper or as headings to note paper, or printed on distinct sheets and sewn together in a cover. The defend-

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ants' imitation consisted of seven views similar to those of the [105] plaintiffs', sewn *together in a cover, which described them on the outside as "The Leporello Album of Yarmouth views." The plaintiffs' views had been published at various times between the years 1863 and 1871. Each print or engraving had on the publication line the words "Rock & Co., London," together with a number for reference on one side, and on the other side the day of the date of the first publishing of the print or engraving. The defendants at the bar offered to submit to a perpetual injunction, if costs were not asked against them, but the offer was refused.

Mr. Glasse, Q.C., Mr. Chitty, and Mr. Shortt (of the Common Law Bar), for the plaintiffs: It has been suggested that there is a question whether the words of the statute of 8 Geo. 2, c. 13, s. 1 ⁽¹⁾, under which the present question arises, have been sufficiently complied with by the description of the proprietors of the prints. It is clear, however, on the authorities, that what has been done is quite sufficient, and it would be absurd to say that the proprietors could not be traced by the description "Rock & Co., London," which is the proper trading name of [106] the plaintiffs. *Graves v. Ashford* ⁽²⁾ is a *clear authority that the trading name is sufficient, the suggestion in that case being really that the description was too full. It is unnecessary to do more than give the surname of the proprietor: *Blackwell v. Harper* ⁽³⁾; *Newton v. Cowie* ⁽⁴⁾. Ignorance of the plaintiffs' rights does not excuse the defendants: *West v. Francis* ⁽⁵⁾; *Clement v. Maddick* ⁽⁶⁾; and the right to the injunction carries

⁽¹⁾ The enacting part of sect. 1 of 8 Geo. 2, c. 13, began as follows: "Be it enacted that from and after the 24th day of June, which shall be in the year of our Lord one thousand seven hundred and thirty-five, every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro-oscuro, or from his own works and inventions shall cause to be designed and engraved, etched, or worked, in mezzotinto or chiaro-oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of 14 years" [which by a later act, 7 Geo. 3, c. 38, was extended to twenty-eight years], "to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints."

It then enacted certain penalties in

case "any printseller or other person whatsoever, from and after the said 24th day of June, one thousand seven hundred and thirty-five, within the time limited by this act, shall engrave, etch, or work as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him or them respectively in the presence of two or more credible witnesses."

⁽²⁾ Law Rep., 2 C. P., 410.

⁽³⁾ 3 Atk., 93.

⁽⁴⁾ 4 Bing., 234.

⁽⁵⁾ 5 B. & A., 737.

⁽⁶⁾ 1 Giff., 98.

with it the right to the costs of the suit: *Burgess v. Hills* ⁽¹⁾; *Kerr on Injunctions* ⁽²⁾.

Mr. H. F. Bristowe, Q.C., and Mr. H. Ludlow, for the defendants: The prints in question were published on several different occasions, and on not one of them is the proprietorship correctly stated. It was an object of the act to protect the public as well as the proprietors, and that protection cannot be given unless the names of all the proprietors are given. There is no case in which it has been held sufficient to name only one of several proprietors, and *Graves v. Ashford* ⁽³⁾ is a distinct authority the other way. The necessary inference from the judgment is, that if Henry Graves had had a partner the designation of the proprietorship would have been held insufficient. *Newton v. Cowie* was also a case in which there was only one proprietor. The object of requiring the names of all the partners in a firm to be specified is that the parties may know whom to sue: *Jefferys v. Baldwin* ⁽⁴⁾, just as under the Ship Registration Act the names of all the owners of a ship are required to be on the register: *Slater v. Willis* ⁽⁵⁾. Precision is as much required in the names of the proprietors as in the day of publication, which must be given exactly: *Matthieson v. Harrod* ⁽⁶⁾.

SIR R. MALINS, V.C., after stating the facts, continued: It is not disputed that the prints of the defendants have substantially been made from copies of those of the plaintiffs. The latter have consequently *prima facie* a right to an injunction to *restrain their publication, and the defendants would have [107 been willing to submit to a perpetual injunction if the costs of the suit were not also insisted on. But as the plaintiffs press for their costs as well, their right to an injunction has been strenuously resisted, on the ground of non-compliance with the terms of the Copyright of Designs Act as to inscribing the names of the proprietors on the objects sought to be protected.

I take it to be perfectly clear that the plaintiffs are generally known as "Messrs. Rock & Co.," which is the name under which they trade. But it is said that merely to inscribe the trading name is not a compliance with the Copyright of Designs Act, because it does not give the names of the proprietors. Then the question is, What is required to be given as the name of the proprietor? Is his Christian name required as well as his surname? *Newton v. Cowie* ⁽⁷⁾ has already decided that the surname is sufficient. In the present case the name of the firm under which the plaintiffs trade has been given; and since it

⁽¹⁾ 26 Beav., 244.

⁽²⁾ Page 228.

⁽³⁾ Law Rep., 2 C. P., 410.

⁽⁴⁾ Amb., 164.

⁽⁵⁾ 1 Beav., 354.

⁽⁶⁾ Law Rep., 7 Eq., 270.

⁽⁷⁾ 4 Bing., 234.

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has been decided that the whole name of the proprietor need not be put on a print or engraving, it appears to me to follow that it is quite sufficient to give the name of the firm under which the proprietors trade. Any one desiring to sue them has only to write and ask who are the partners in the business. The information given by putting the name of the firm on the print or engraving is therefore necessarily sufficient.

Mr. Bristowe says that it is the necessary inference from *Graves v. Ashford* ⁽¹⁾ that the name of every proprietor should be inscribed, but I think that by no means follows from the words of the judgment. On the contrary, I infer from it that if Henry Graves had had a partner the designation would have been sufficient, and that the only question was, whether the addition of the words "and company," did not imply that he had a partner, and so lead to the false inference that he was not the sole proprietor. I think that the trading name of the firm is a sufficient designation, inasmuch as it enables parties to know whom to apply to for information, and whom they must sue. The plaintiffs are, consequently, entitled to the injunction.

Solicitors Mr. T. H. Strangways ; Mr. G. Noon.

[Law Reports, 15 Equity Cases, 110.]

V.C.B. Nov. 16, 1872.

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* *In re STEEVENS' TRUSTS.*

Will — Construction — Direction to divide a Sum of Money after a Life Estate "amongst the Heirs of my late Brother J. S." — Next of Kin Entitled.

Testatrix, after devising real estate to a devisee, "and to her heirs and assigns," bequeathed to her trustees £500 upon trust to invest and pay the proceeds to E R for life, and in case (which happened) E R should leave no child living at her (E R's) decease, "then I direct my said trustees to divide the said sum of £500 . . . amongst the heirs of my late brother" J S :

Held, that by the word "heirs" were meant the next of kin of J S, according to the Statute of Distributions, together with the widow of J. S., if living at testatrix's death.

Ware v. Rowland ^(*) observed upon.

PETITION. Elizabeth Steevens, spinster, by her will, dated the 18th of August, 1821, devised to the widow of her brother, "and to her heirs and assigns for ever," certain real estate. She devised to three other persons, using the same words of limitation, three other specific portions of real estate respectively. She then proceeded to give and bequeath to trustees £400 stock, upon trust to pay the dividends to one of her nephews for life, then to his wife for life and then to hold the stock upon certain specified trusts for the benefit of their children ; but in case the nephew

⁽¹⁾ Law Rep., 2 C.P., 410.

^(*) 15 Sim., 587.

should leave no child living at his decease, or no child living at his decease who should attain twenty-one, then she directed the trustees to sell and divide the produce of the stock "amongst the heirs of my late brother Joseph Steevens." Testatrix then gave and bequeathed to the trustees £500, upon trust to invest the same "upon such securities as they, my said trustees, may think best, at lawful interest, and that they do and shall pay the interest arising from the aforesaid sum of £500, as it shall become due, unto my niece, Elizabeth Robinson, for and during her natural life; and from and after her decease, my will is that the interest arising from the aforesaid sum of £500 should accumulate and be added to the principal, for the use of the children of my said niece, Elizabeth Robinson, to be paid to them *at such [111] times and in such proportions as they, my said trustees, may think proper; but in case my said niece should leave no such child living at her decease, then and in such case I direct my said trustees to divide the said sum of £500, with the interest due thereon, amongst the heirs of my late brother Joseph Steevens." Testatrix then made a bequest of £400 upon trusts that were similarly expressed, except that the ultimate gift, in default of children, was to one of her nieces simply, without any words of limitation. After some further legacies she bequeathed her residuary real and personal estate to "the five youngest children of my late brother Joseph Steevens" (naming them) "to be equally divided amongst them." Testatrix died in 1829. Elizabeth Robinson had children, who all died in her lifetime. She died on the 19th of December, 1869. The question, which arose only as to the £500, was, whether by the expression "the heirs of my late brother Joseph Steevens," was meant the heir-at-law of Joseph Steevens (who died in 1801), or his next of kin according to the Statute of Distributions, of whom his heir-at-law was one, and his niece, the above mentioned Elizabeth Robinson, was another. The trustees had paid a fund representing the £500 into court.

Mr. *F. T. White*, for the petitioners, who were some of the next of kin: The word "heirs" must here be construed as descriptive of the persons appointed by law to succeed to this kind of property: *Vaux v. Henderson* ⁽¹⁾; *Evans v. Salt* ⁽²⁾; such persons being not the nearest of kin, but those who would be entitled under the Statutes of Distribution: *Doody v. Higgins* ⁽³⁾; *In re Porter's Trust* ⁽⁴⁾; *In re Gamboa's Trusts* ⁽⁵⁾; *In re Newton's Trusts* ⁽⁶⁾; *Herrick v. Franklin* ⁽⁷⁾.

⁽¹⁾ 1 Jac. & W., 388, n.

⁽²⁾ 6 Beav., 266.

⁽³⁾ 9 Hare, App. xxxii.; 2 K. & J., 729.

⁽⁴⁾ 4 K. & J., 188.

⁽⁵⁾ Ibid., 756.

⁽⁶⁾ Law Rep., 4 Eq., 171.

⁽⁷⁾ Ibid., 6 Eq., 593.

Mr. W. Pearson, for respondents, the trustees; one of whom was another of the next of kin: In a gift of personalty the [112] word "heir" means next of kin. But *here, in addition, the word is in the plural, "heirs;" and there is the expression "amongst the heirs," showing an intention to distribute.

Mr. Blackmore, for the heir-at-law: Where there is a simple gift of personal estate to the "heirs" of A, that is a gift *primâ facie* to the heir-at-law of A, as *persona designata* — not to the next of kin. In order to entitle the next of kin, there must be something on the face of the will to give to the words a sense other than their primary and natural meaning: *In re Rootes* (1); *Southgate v. Clinch* (2). No such contrary intention appears here. From the gift of the residue to younger children an intention to benefit the heir may be presumed. Hence the heir takes: *Hamilton v. Mills* (3). Nor is there any distinction arising from the use of "heirs" in the plural: *De Beauvoir v. De Beauvoir* (4); *Pleydell v. Pleydell* (5). The decision in *Evans v. Sutt* (6) was expressly set aside by Lord St. Leonards, when lord chancellor, in *De Beauvoir v. De Beauvoir* (7), and was not followed by Vice Chancellor Kindersley in *In re Rootes*. In *Ware v. Rowland* (8) the words "to and among" the testator's "heirs-at-law, share and share alike," were held to designate the person or persons (in the event, his sister) who at his death filled the character of his heir-at-law. From this decision it follows that the word "amongst" makes no difference; which further appears from the observation, that where the testatrix wishes to make an equal distribution (as, for instance, amongst the descendants of Elizabeth Robinson), she uses the apt word "children." Here the word, as in the first clause of the will, is precise and technical, and must be construed accordingly.

Mr. White, in reply: In *In re Rootes* the gift was to the heirs [113] of a person deceased *at the date of the will. In *Southgate v. Clinch* (2) the word was in the singular—"next heir-at-law;" in *Hamilton v. Mills* (3) the limitation was to the "right heirs" of the survivor of two persons, a distinction pointed out by Lord Romilly in commenting, in the case of *In re Philips' Will* (9), on his own decision. *De Beauvoir v. De Beauvoir* (4) was the case of a mixed fund; as was also *Pleydell v. Pleydell* (5). In *Ware v. Rowland* (6) the legatee who took under the expression, "to and amongst my heirs-at-law share and share alike," filled the characters both of heir-at-law and next of kin of the testator at his death; and the contention was raised by parties

(1) 1 Dr. & Sm., 228.

(2) 4 Jur. (N.S.), 428; 27 L.J. (Ch.), 651; 6 W. R., 489; 31 L. T., 263.

(3) 29 Beav., 193.

(4) 3 H. L. C., 524.

(5) 1 P. Wms., 748.

(6) 6 Beav., 266.

(7) 3 H. L. C., 556.

(8) 15 Sim., 587; 2 Ph., 635.

(9) Law Rep., 7 Eq., 151, 153.

who were the testator's co-heirs and next of kin at the legatee's death; so that the authority is not in point.

SIR JAMES BACON, V.C.: This is one of those cases which certainly call for the enactment of a code, or of some rule for the interpretation of expressions to be found in wills. In the midst of the "confusion worse confounded" which exists among the authorities on this subject, I must endeavor to put such a construction upon the language of this will as the general sense of the instrument requires.

Where the words of gift are "to the next heir," or "to the heirs-at-law," there seems to be comparatively little difficulty; but where the word is "heir" only, considerable doubt arises. And here, I confess, I was struck with the remark in the judgment in the case of *Ware v. Rowland* ⁽¹⁾, where the vice chancellor of England observes that it cannot be argued, with any show of reason, that there is any substantial difference between the words "heirs-at-law" and "heirs." I should be very sorry to pronounce an opinion at variance with one of Sir L. Shadwell, who was so remarkable for his powers of construing ambiguous instruments; but, although I do not concur in the learned vice chancellor's observation, I find sufficient peculiarity in the circumstances of that case to prevent my regarding it as a binding authority in the *present instance. There the [114 gift upon which the question turned was "to and among the heirs-at-law" of the testator himself, "share and share alike;" here it is to the heirs of a stranger. Nor do I feel embarrassed by the observations which have been made upon the decision of Lord Langdale in *Evans v. Salt* ⁽²⁾. The remark of Lord St. Leonards, when lord chancellor, in *De Beauvoir v. De Beauvoir* ⁽³⁾ was made in a case which was one of a mixed fund of realty and personalty, and therefore inapplicable to the present; and in *In re Rootes* ⁽⁴⁾ the bequest was to the heirs of three deceased persons, which again was very different. There are a variety of other cases in which the word "heirs" has been held to mean, not heirs-at-law but next of kin; and I think that, in this instance, it would be going not only against many authorities, but still more against the testatrix's plain and obvious intention, if I were to hold that by the word "heirs" she meant heir-at-law. It is said that because the testatrix has picked out five of the children of her deceased brother, and given them shares in the residue, it is probable that she meant to confine the ultimate gift of this £500 to the single male person who was her brother's heir-at-law. In my opinion that circumstance

⁽¹⁾ 15 Sim., 587, 593.

⁽²⁾ 6 Beav., 266.

⁽³⁾ 8 H. L. C., 556.

⁽⁴⁾ 1 Dr. & Sm., 238.

leads to a directly opposite conclusion. It appears to me that where she wishes to benefit particular children she names them, and where she wishes to benefit all the children alike, not being able to express herself with legal accuracy, she has recourse to the word "heirs." I do not say the result is clear, but I think, upon the whole, I cannot come to any other conclusion than that the testatrix intended to benefit the whole family of John Steevens. I should observe that Mr. Blackmore pressed upon me the observation that, from the use of the words "heirs and assigns" in the devise of real estate, the testatrix must have known what were proper and what were improper words to use in bequeathing her property of different kinds. But no such words as "heirs and assigns" occur in this bequest. If it had been a simple gift to the heir-at-law of Joseph Steevens, the result might have been altogether different.

115] *Mr. Pearson said if the widow should be living she would be entitled to a share with the next of kin. There was no statement as to this fact.

THE VICE CHANCELLOR made a declaration that by the word "heirs," the next of kin of Joseph Steevens were indicated; and directed the petition to be amended by stating either that there was or was not a widow of Joseph Steevens living at the death of the testatrix; the costs of all parties, and the costs, charges, and expenses of the trustees to be paid out of the fund in court; and if there should be, or have been, a widow of Joseph Steevens living at the testatrix's death, that the fund should be divided so as to give her or her representatives a share with the next of kin.

Solicitors: Messrs. *Letts*; Mr. *Whale*.

[Law Reports, 15 Equity Cases, 115.]

V.C.B. Nov. 14, 16., 1872.

MURRAY V. CLAYTON.

[1869 M. 30.]

Patent — Injunction — Discovery — Names and Addresses of Purchasers — Names and Addresses of Agents.

A patentee of improvements in brick-cutting machines, who was a manufacturer of the machines by an agent at the agents' works and not a licenser, having obtained a perpetual injunction against defendants, who were also manufacturers of brick-cutting machines, from infringement, the defendants were ordered to file an affidavit stating the number of machines made by them since the date of the patent, and the names and addresses of the persons to whom the same had been sold, and of the agents concerned in the transactions. Upon motion to vary the order:

Held, that the plaintiff was entitled to have discovery of the names and addresses of the purchasers, but not of the agents concerned, there being nothing to show that any agents had been employed.

ADJOURNED SUMMONS. This was a summons on behalf of the defendants to vary an order of the court. By an order of the lord justices, dated the 6th of May, 1872, a perpetual injunction was granted to restrain the defendants from infringing the plaintiff's patent, which was for improvements *in the [116 construction of brick-cutting machines, with an inquiry as to damages; see the report ⁽¹⁾. By an order made in chambers in this branch of the court, dated the 16th of July, 1872, the defendants were ordered, on the plaintiff's application, to file an affidavit stating the number of brick-cutting machines made by them since the 8th of June, 1866, the date of the patent, "and the names and addresses of the persons to whom the same respectively have been sold, or for whom the same have been purchased, and the names of the agents concerned in the transactions." The defendants made an affidavit stating the number of machines made by them since the 8th of June, 1866, but not stating the names and addresses of the purchasers, and afterwards took out the present summons to vary the order of the 16th of July, 1862, by striking out the words in inverted commas above. The situation of the plaintiff was this: He employed an agent to manufacture and sell brick-making machinery fitted with his patent, but the manufacture was carried on in workshops which were the property of the agent; and the plaintiff did not issue licenses. A summons on behalf of the plaintiff, questioning the sufficiency of the affidavit, was set down to be heard at the same time. The defendants opened their summons first, and in so doing said they were willing to let the order of the 16th of July, 1862, stand, on the undertaking of the plaintiff that he would not take proceedings against any of the purchasers whose names might be thereby disclosed; but the plaintiff declined.

Mr. *Fooks*, Q.C., Mr. *Aston*, Q.C., and Mr. *E. Carpmael*, for the defendants: The order, so far as it is directed to the names and address of the purchasers, is excessive. A patentee, who is not a manufacturer of the machines fitted with his invention, having obtained a decree for damages against an infringing manufacturer, by reason of use or vending of the invention, cannot claim from the defendant, by way of damages, a manufacturing profit: *Penn v. Jack* ⁽²⁾. We contend that the *plaintiff is a person who is not a manufacturer within [117 the meaning of the above rule, and that, not being entitled to a manufacturing profit by way of damages, he cannot insist

⁽¹⁾ Law Rep., 7 Ch., 570.

⁽²⁾ Law Rep., 5 Eq., 81.

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upon having the names and addresses of purchasers. The principles on which this court proceeds when an interim injunction is applied for pending an action are explained in *Bridson v. Macalpine* ⁽¹⁾. In an action for infringement, the account at common law, under the 42d section of the 15 & 16 Vict. c. 83, extends to the profits actually made by the defendant only, not to the loss of the plaintiff: *Elwood v. Christy* ⁽²⁾; and if the plaintiff be the assignee of a patent, the account will be directed only from the date of the assignment ⁽³⁾.

Mr. Higgins, Q.C., and Mr. Melville, for the plaintiff: The object of the motion is to postpone the inquiry in chambers as long as possible, there being an appeal pending.

The vice chancellor observed that no consideration of that kind would influence him; and desired to hear the argument on the merits.

Mr. Higgins and Mr. Melville: The order is in the common form. No attempt was made to comply with it, to impeach it, to qualify it, or to get further time until after the affidavit was filed, and not till then did the defendants seek to vary the order.

"The defendant must, if required, . . . set out . . . the names and addresses of all persons from which he has received sums of money in respect of royalties or licenses to use the patent article:" Kerr on Injunctions ⁽⁴⁾, referring to *Crossley v. Stewart* ⁽⁵⁾; *Howe v. McKernan* ⁽⁶⁾; and *a fortiori* after decree; *Delarue v. Dickinson* ⁽⁷⁾; *Leather Cloth Company v. Hirschfield* ⁽⁸⁾; *Telley v. Easton* ⁽⁹⁾. The words here excepted to have been the 118] subject of judicial *decision, even before this cause came to a hearing: *Penn v. Bibby* ⁽¹⁰⁾; *Betts v. Neilson* ⁽¹¹⁾. Mere inspection of the books is not sufficient: *Telford v. Ruskin* ⁽¹²⁾; *In re Saxby's Patent* ⁽¹³⁾. [They also cited: *Davenport v. Rylands* ⁽¹⁴⁾; *Betts v. De Vitre* ⁽¹⁵⁾; *Swinborne v. Nelson* ⁽¹⁶⁾; *Ord v. Fawcett* ⁽¹⁷⁾; *Tagg v. South Devon Railway Company* ⁽¹⁸⁾; *Brown v. Perkins* ⁽¹⁹⁾; Taylor on evidence ⁽²⁰⁾; *Brinsmead v. Harrison* ⁽²¹⁾.] Mr. Fooks, in reply, referred to *Millington v. Fox* ⁽²²⁾; *Stokes v. City Offices Company* ⁽²³⁾, and *Numm v. Albuquerque* ⁽²⁴⁾.

SIR JAMES BACON, V.C.: This case has taken a long time to

⁽¹⁾ 8 Beav., 229, 232.

⁽²⁾ 18 C. B. (N.S.), 494.

⁽³⁾ Ibid.; 5 N. R., 12.

⁽⁴⁾ Page 437.

⁽⁵⁾ 1 N. R. 426; 7 L. T. (N.S.), 848.

⁽⁶⁾ 30 Beav., 547.

⁽⁷⁾ 3 K. & J., 388.

⁽⁸⁾ Law Rep. 1 Eq., 299.

⁽⁹⁾ 18 C. B., 643.

⁽¹⁰⁾ Law Rep., 3 Eq., 308.

⁽¹¹⁾ Ibid., 3 Ch., 429, 440.

⁽¹²⁾ 1 Dr. & Sm., 148.

⁽¹³⁾ Law Rep., 3 P. C., 293.

⁽¹⁴⁾ Ibid. 1 Eq., 302.

⁽¹⁵⁾ Ibid. 3 Ch., 429.

⁽¹⁶⁾ 16 Beav., 416.

⁽¹⁷⁾ 19 L. J. (Ch.), 487.

⁽¹⁸⁾ 12 Beav., 151.

⁽¹⁹⁾ 2 Hare, 540.

⁽²⁰⁾ 6th Ed. ii., 1267, 8; §§ 1317, 8.

⁽²¹⁾ Law Rep., 6 C. P., 584.

⁽²²⁾ 3 My. & Cr., 538.

⁽²³⁾ 13 L. T. (N.S.), 81.

⁽²⁴⁾ 34 Beav., 595.

argue, although it relates to the most ordinary matter of practice. A good many cases relating to trade-marks, and the infringement of patents, and granting of injunctions, have been cited in the course of the argument, which have really no application to the present matter in dispute. The decree is in the plainest possible terms. It directs an inquiry as to what compensation is to be paid by the defendants in respect of the damage sustained by the plaintiff by reason of the defendant's infringement of the plaintiff's letters patent. As a matter of course, in prosecuting that inquiry, the plaintiff is entitled to have from the defendants the fullest possible discovery. That is so well settled that no case can be referred to in which that practice is called in question. Among other things the plaintiff is entitled to that which the order gives him—the names and addresses of the persons to whom machines were sold; and if the order had stopped there I should have thought that no objection could successfully have been made to it. The *words are: [119 "Make and file an affidavit or affidavits stating the number of brick-cutting machines made or caused to be made by them since the 8th day of June, 1866, the date of the plaintiff's letters patent mentioned and referred to in the first paragraph of the bill in this cause, and the names and addresses of the persons to whom the same respectively have been sold, or for whom the same have been purchased." To that, according to the ordinary settled practice of the court, the plaintiff would be entitled. Then follow these words: "and the names of the agents concerned in the transactions," of which I can make no sense, and which do not seem to be in the slightest degree necessary for working out the right which the plaintiff has under the decree. If it should at any future time be necessary in any state of circumstances properly brought under the notice of the judge in chambers, then, of course, an inquiry might be made about agents, when one knows that there have been any agents, or any transactions in which agents have been concerned. In my opinion the order is erroneous in the part which contains those words relating to the agents who were concerned in the transactions. There are two summonses before me, one by the plaintiff to consider the sufficiency of the affidavit, and the other by the defendants, in which they ask for a variation of the order in the manner there specified, namely, by striking out these words, "and the names and addresses of the persons to whom the same respectively have been sold, or for whom the same may have been purchased, and the names of the agents concerned in the transactions, or to vary such order by striking out such words, unless the plaintiff will undertake not to take or threaten to take any proceedings against any of such persons or agents without

the permission of the court, and to make such other order in relation to the matter of this application as to this court may seem just." That is the gravamen of the defendants' application, because they apprehend, whether their apprehension be well founded or not, that if they were to furnish the plaintiff with the names and addresses of the persons to whom they have sold machines, the plaintiff might feel inclined to attack them, and issue processes against them; and that, as a consequence, the [120] business of the defendants would *be injured. That is a consideration to which I can in no degree attend. If the inconvenience which they apprehend should ever happen, it will be in consequence of that which, as the law now stands, has been decided to be a wrong done by the defendants. They cannot excuse themselves, or avoid the discovery which is asked, because of any consequences which may ensue from their wrongdoing. I have no reason at present to believe that any such inconvenient consequences will ensue. If I had positive proof, I could not, therefore, interfere. I could not alter the order of the lords justices by adding to it such a condition as this, and I could not, under the circumstances, impose on the plaintiff any such undertaking as is sought; and yet that is the sole object of this motion. The affidavit, to which I need not refer more particularly, expresses it in the most distinct terms. It does not suggest any reason why I am at liberty to alter the practice of the court, or the terms of that order, so far as it is in accordance with the practice of the court. No doubt the court will, as has been argued very strongly, do its best to keep the litigation within its proper bounds; but if, by reason of this suit, this plaintiff should have any remedy against any other persons not parties to this suit, I cannot by anticipation interfere so as to prevent him taking any proceedings he may be advised to take. I therefore cannot comply with the terms of that summons, further than to vary the order of the 16th of July, by taking from it the words which I have mentioned. The other summons is as to the sufficiency of the affidavit. Now the affidavit is, on the face of it, insufficient. It does not admit of argument, and there is no question about it. It is insufficient no doubt because it does not furnish that information which the defendants were bound to give. All I can do is to direct the order of the 16th of July to be varied in the manner I have mentioned; and upon that summons I can give no costs on either side. On the other, which is considered as the affidavit summons, I find the affidavit to be insufficient; and there must be a further affidavit made, and the costs of that summons, [121] I think, ought not to be reserved. *It is unnecessary for me to say, nor indeed has it been argued, that the right of the

parties cannot be affected by reason of the pendency of the appeal. In justice to Mr. Fooks I ought to say he has argued no such thing. I observe upon it only for this reason: the defendants having applied to the lords justices to suspend the execution of this decree, the application was unsuccessful. The lords justices have decided that whatever may be done hereafter, in the meantime the inquiry must go on; and it is the subject of the inquiry upon which I am now engaged. The affidavit required by the order and by the practice of the court must be made, and with the consequences of it, which the future must determine, I cannot interfere in the slightest decree. There will be one order on the two summonses.

Solicitors for the plaintiff: Messrs. *Vallance & Vallance*.

Solicitors for the defendants: Messrs. *Wilson, Bristow & Carmichael*.

[Law Reports, 15 Equity Cases, 121.]

V.C.B. Dec. 4, 1872.

COVERDALE v. EASTWOOD.

[1871 C., 137.]

Marriage — Statements in Writing by Wife's Father of intention to settle — Agreement made upon consideration of Marriage.

After proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows: "V being my only child, of course she will come into the possession of what belongs to me at my decease." In a subsequent letter, addressed to the mother of the intended husband, the father, after declining then to extract £4000 from his business, and stating that some years since he had made a will leaving "all my property" in trust for his daughter for life for her separate use, and the principal to be divided as she by her will might ultimately dispose of, he said, "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property (subject to my sister's annuity) on my daughter absolutely and independent of her husband; or, in other words, in strict settlement." He further "agreed" to allow his daughter and her husband £100 a year during his life; and added, "I will take care that my property (which, I suspect, will exceed £4000) shall be properly secured upon her and her children after my death." The marriage having taken place, the father, who was then a widower, afterwards married again, and made a will whereby he devised and be- [122] queathed parts of his property to his wife, and gave several life annuities.

Upon bill by the daughter, claiming to have all the property of which the testator died seized or possessed settled upon her in strict settlement:

Held, that the above expressions of intention on the part of the testator amounted to a contract to settle the whole of the property of which he should die seized or possessed upon the plaintiff in strict settlement.

MOTION FOR DECREE. In July, 1862, Frederick John Coverdale made proposals of marriage to Veronica, only child of Richard Eastwood, which were accepted, subject to the father's approval; and on the 22d of July, 1862, Mr. Eastwood wrote to Mr. Coverdale a letter containing the following passage: "I am

not what the world calls a rich man, and what capital I possess, or nearly so, is embarked in a large cotton business with a relation of mine, and in the management of a large farm here. Veronica being my only child, of course she will come into the possession of what belongs to me at my decease, and probably I should be able to make her some small allowance during my life time. I mention this, because the world, I understand, gives me credit for being more wealthy than I really am, and I wish to be plain and straightforward with you in this matter." The marriage was fixed to take place in July, 1863, and in that month Mrs. Coverdale, the mother of Frederick John Coverdale, wrote to Mr. Eastwood, stating that her son was willing to settle £4000 on Miss Eastwood, and inquiring whether he was inclined to make a corresponding settlement on her.

On the 6th of July Mr. Eastwood wrote as follows: "In answer to your letter I have merely to observe that I am not in a position at the present moment to extract £4000 from my capital invested in trade, for the purpose of settling the same on my daughter. Some years ago I made my will, by which I left all my property to certain trustees therein named, upon trust to make all my estate into money, and invest the same on government or real security, and pay the interest to my daughter during her life, independent of any husband with whom she might intermarry, and the principal to be divided as she by her will might ultimately dispose of. It has been my intention, in [23] the event of *the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property (subject to my sister's annuity) on my daughter absolutely and independent of her husband, or in other words in strict settlement. This is all I am in a position to do at the present time (without crippling my resources) beyond the fact of having agreed to allow the young couple £100 per annum during my life, which, if your son wishes it, I am willing to give a bond for its due payment. I quite agree and approve of your observations, but Veronica being an only child there is not the same absolute necessity for the settlement of her money as there would have been had I had other children. I will take care that my property (which I suspect will exceed £4000) shall be properly secured upon her and her children after my death."

The marriage took place on the 16th of July, 1863, and there were issue several children. At the date of the marriage Richard Eastwood was a widower. In 1865, he married again, and in 1868 he made another will, whereby he purported to give his household goods and effects to his wife for life, and after her decease to his daughter "absolutely and beneficially." He be-

queathed his dairy stock to his wife "absolutely and beneficially." He also bequeathed to his wife all his interest in the house and farm called Thorneyholme, then occupied by him, and so much of the farm buildings as might be requisite for her use, for life, free from rent, and after her death he directed the same to fall into and form part of the farm to which it belonged, thereafter bequeathed. He bequeathed his leasehold estate in the farm then occupied by him, called Staple Oak, subject, however, together with the other farms then occupied by him, to the life interest of his wife, to John Lewis absolutely and beneficially. The rest of Thorneyholme and other farms in his occupation he gave, subject to the life interest of his wife, to trustees upon either to farm or sublet the same, and to pay the balance of the rents and profits to his daughter during the continuance of the term "her executors and administrators, absolutely and beneficially." He gave and bequeathed to trustees his leasehold mill, cottages, and machinery at Clow Bridge, upon trust to receive the rents and profits, and after payment of expenses, to pay to his *wife an annuity of £250 during her life, [124 also to pay his sister Ann Guinan, widow, an annuity of £150 during her life, also to pay certain sums for the maintenance and advancement of one Henry Sagar, an articled clerk, and to pay the balance to his daughter "absolutely and beneficially," and after the satisfaction of the same trusts, he bequeathed the same mill, cottages, and machinery to his daughter, "her executors, administrators, and assigns, absolutely and beneficially." He gave and devised all his mansion house, farm, and premises called Swinshawe, and all the residue of his real estate to his daughter, "her heirs and assigns, absolutely and beneficially." He bequeathed to his cousin Mary Lewis, spinster, fifty shares in the Whitewell Mining Company, absolutely and beneficially. He gave and bequeathed the residue of his personal estate to his daughter, "her executors, administrators, and assigns, absolutely and beneficially.

On the 7th of May, 1871, Richard Eastwood made another will (his last), and on the 29th of May, 1871, he died, having regularly paid the £100 a year to Mr. and Mrs. Coverdale up to his death. By his will he bequeathed his household goods and effects unto, and equally between his wife and his daughter. He devised his freehold dwelling house, called Springfield Cottage, to his wife, her heirs and assigns, absolutely, and he also bequeathed his leasehold interest in a farm then in his possession, and his live and dead farming stock and crop therein, to his wife absolutely; and gave her a legacy of £500. He devised his estate called Swinshawe, and all other his real estate not thereinbefore devised, and bequeathed the residue of his

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personalty, to trustees upon trust to sell and convert, and to invest and stand possessed of the fund upon trust out of the income to pay his daughter for life an annuity of £250, and to pay the remainder of the income as follows; one-third to his wife for life; one other third to his sister, Ann Guinan, for life; and the remaining third to his sister-in-law, Elizabeth Grimshaw, for life; and subject to the payments aforesaid, the capital as well as the income of the fund were to be in trust for his daughter absolutely. The bill was filed by Mrs. Coverdale, by her next friend, against the widow, the acting trustee of the [25] will, the two other life annuitants, the infant children and the husband, alleging that the testator did not, save as appeared from the will, make any settlement upon her or upon her children, and that he died seized and possessed of property amounting, so far as she had been able to ascertain, to about £18,000. The bill alleged that the defendant Frederick John Coverdale was ready and willing to settle £4000 on the plaintiff, and prayed for a declaration "that the hereinbefore stated letters of the said Richard Eastwood amount to and constitute a contract by him for valuable consideration to settle the whole of the property of which he died seized or possessed, or at all events the sum of £4000, out of his estate, upon the plaintiff in strict settlement, and in priority to the claim of any creditor of the said Richard Eastwood;" and for other consequential relief. The defendants, the widow, the acting trustee, and the annuitants, by their answer denied that the marriage "was solemnized on the faith of the representations or statements contained in" the letters, "or in the belief by the plaintiff or her husband that the whole of" the testator's "property would, as represented by him, be settled by him on the plaintiff, for," they said, "such marriage was definitely arranged and fixed a considerable time before July 1863, and independently of" the letters . . . "and without any reference whatsoever to the settlement of any property or money by" the testator, "by deed, will, or otherwise." The answer further stated that the testator's estate was proved under £12,000, and the defendants believed that after payment of debts it would not amount to more than £4000. The estate was being administered in another suit. The plaintiff made an affidavit in which she said that her marriage was solemnized "entirely upon the faith of the representations and statements contained in the said letters . . . and in the belief which was entertained both by me and by my said husband, that the whole of his property would, as represented by him, be settled by him upon me." She said she believed she showed the draft of the will of 1868 to her husband.

In support of the defendants' case the solicitor who prepared

the will of 1868 deposed that several alterations were made in the draft, as he believed at the suggestion and request of the plaintiff *and her husband; and that when the draft was [126 finally settled the plaintiff and her husband expressed themselves perfectly satisfied therewith, and did not raise the question of such will being a compliance or non-compliance with the promise of a settlement."

Some letters were also relied on by the defendants, as supporting the case of acquiescence on the part of the plaintiff. In one of them, a letter addressed by the plaintiff to Mrs. Eastwood, dated the 7th of March, 1868, she said: "With regard to the will I can never thank you enough for persuading papa to let you lend me the sketch of it, as it has saved any further disagreements. It appears to me all quite right as far as I can judge, but do you think papa would let me see the draft of it, as there might be several little things which could be settled now, but could not be altered afterwards; and of course as papa can do as he likes, he would not be obliged to make any alterations we might suggest, if he did not approve them, so there would be no harm done." There was no evidence to show what was meant by the reference of the testator in the letter of the 6th of July, to his "sister's annuity."

Mr. Kay, Q.C., and Mr. Nalder, for the plaintiff: This is an agreement made upon consideration of marriage within the statute (29 Car. 2, c. 3, s. 4), and hence binding on the estate of the testator who made the contract: *Saunders v. Cramer* (1); *Moorhouse v. Colvin* (2); *Laver v. Fielder* (3). The precise contract was, to leave everything the testator could leave; or as he expressed it in the second letter "all my property." By the widow's answer the point is not raised as a disputed question. The solicitor says he communicated knowledge of the contents of the will to the wife, and that from her a sort of assent was obtained. But there is nothing to show that the husband ever heard of the terms of the will. The letter is valueless, unless it be effectual to avoid the contract made with the husband.

*Mr. Amplett, Q.C., for the defendants, the husband and [127 the infant children: We say that the contract embraces and provides for the children; and that no arrangement after marriage can alter or disturb their rights. The real question is, whether the expression of intention on the part of a promisor when followed by action on the part of the promisee, amounts to a contract. On this point we rely on the observations of Lord Chancellor Cottenham, in *Hammersley v. De Biel* (4), whose judgment was affirmed by the house of lords.

(1) 3 Dar. & Wr., 87.

(2) 15 Beav., 341.

(3) 32 Beav., 1.

(4) 12 Cl. & F., 45, 62, n

Mr. *Little*, Q.C., and Mr. *E. S. Ford*, for the defendants, the executors and trustees of the will, and the three life annuitants : The case as against creditors has been abandoned. Mr. *Amphlett* abandons the second theory of the bill, that the contract was to settle £4000. He says he, on behalf of the children, is not interested in the first letter at all ; children being mentioned only in the second letter. We contend that the second letter contains no such contract as this court will enforce. It is only a statement of the present intention, which was to be carried out "in accordance with the facts of the case ;" i.e., was to be subject to alteration. Did the husband ever accept the testator's offer ? There is no proof that he married the daughter on the faith of the representation of intention. As a denial of that proposition the letter of the 7th of March, 1868, is most material. It is not a question of the wife having, after marriage, agreed to vary her rights ; the question is whether the rights existed. Neither the husband nor the wife explicitly denies that either of them ever saw the will. The parties have simply put their own construction upon what the letter meant. We could not raise the point by answer, because the letter did not come out till the affidavit as to documents was filed. The question of how far the expression of an intention to settle amounts to a contract must depend upon the language of each particular case. 128] An instance which negatived the proposition is **Randall v. Morgan* ⁽¹⁾, referred to in *De Beil v. Thomson* ⁽²⁾, and commented on by Lord St. Leonards in *Maunsell v. White* ⁽³⁾, which decision was affirmed on appeal ⁽⁴⁾. Other instances of promises so vague that the court would not enforce them, are *Kay v. Crook* ⁽⁵⁾ ; *Stroughill v. Gulliver* ⁽⁶⁾.

Then as to Mr. Coverdale's part of the contract — he agreed to settle £4000 ; but he never did settle that amount ; he only now offers at the bar to do so. He has receded from the terms of the contract, which, consequently, on this ground also, cannot be enforced. The plaintiff claiming as a purchaser for value must prove her case. There must have been an offer by one party, accepted by the other. As to the £4000, the testator refused to settle that sum ; and the only occasion on which the word "agreed" is used, is where he is speaking of allowing the young couple £100 a year, a contract which he strictly fulfilled. The cases will be found collected in *White and Tudor's Leading Cases in Equity* ⁽⁷⁾.

SIR JAMES BACON, V.C. : The facts of this case are quite clear,

⁽¹⁾ 12 Ves., 67.

⁽²⁾ 8 Beav., 469, 475.

⁽³⁾ 1 J. & Lat., 539, 569.

⁽⁴⁾ 4 H. L. C., 1039.

⁽⁵⁾ 3 Sm. & Giff., 407.

⁽⁶⁾ 2 Jur. (N. S.), 700 ; 4 W. R., 684-27 L. T. Rep., 258.

⁽⁷⁾ 4th Ed., vol. i., p. 782.

and not open to any sort of contradiction or doubt. By the facts of the case, I mean, not only the statements in the affidavits, but the two instruments referred to in the bill, which seem to me to be clear beyond the possibility of question. A gentleman advanced in life, a widower, with an only daughter, has a proposal for her marriage made to him by a gentleman, of whom it appears he entirely approves, and the letter in which he expresses his approval contains this passage: [His honor read the first extract given above, and continued:] I think that letter explains quite sufficiently what was then the intention of the testator in this case, and what ensued upon the writing of that letter. To make a present settlement, he says, is out of his power. He desires to keep his capital in the large *cotton [129] business, and in the large farm of which he speaks; but announces to the intended husband that his only child will "of course come into the possession of what belongs to me at my decease." How far that might have amounted to a contract under other circumstances, it is not necessary here to inquire, because the intended husband having proposed, and being willing, to settle a sum of £4000, his mother writes a letter to the testator, and urges him also to make a settlement. The contents of that letter are not before the court, but the substance of it is proved by the mother's affidavit. In answer, the letter dated the 6th of July, 1863, was written by the testator, and it is upon that letter principally that the case must be decided. In that letter, answering Mrs. Coverdale, the testator says: [His honor read the second of the above extracts, and continued:] Taking these facts together, it appears that the testator desired to have the control of his own property for the purposes of his business in the state of investment in which it then was, but the purpose on his part that whatever property of his might exist at the time of his death should be settled upon his daughter, in the manner here expressed, is clear and distinct. This is addressed to the mother of the intended husband, in answer to a proposition that the husband should settle £4000, and to a request (as I gather from the letter I have been reading) that the father, the testator, should also settle £4000. The letter proceeds to make it clear beyond the possibility of doubt: "It has been my intention, in the event of the marriage taking place, to make a similar will." The nature of his existing will, if it was then existing, was expressed in the previous paragraph, "in accordance with the facts of the case." Now it has been suggested that that must mean in accordance with such facts as shall exist when I make my will, or at the time of my death, or at some other time. I cannot so hold, because the words do not permit me so to hold. The event here spoken of is the event of the marriage, and the

facts of the case would be influenced or changed by the event of marriage. If a marriage should take place, then, consistently with that fact, he says he shall make a will similar to that which he has before made—"And of course I should settle my property, subject to my sister's *annuity"—as to what that means I have not had any explanation—"on my daughter absolutely and independently of her husband, or, in other words, in strict settlement."

Now I am told this gentleman was, or had been, a professional man. Whether he was or not the words he has used must have their proper signification. It seems to me impossible for anybody to hesitate about the meaning of this stipulation—this undertaking—on the part of the father, when the proposition is made that he should settle £4000. He undertakes that he will settle all his property in strict settlement upon his daughter in the event of the marriage taking place. "This," he says, "is all I am in a position to do at the present time (without crippling my resources) beyond the fact of having agreed to allow the young couple £100 per annum during my life, which, if your son wishes it, I am willing to give a bond for its due payment." Then, to make it still more clear, if it required further clearance, he says, "I will take care that my property (which I suspect will exceed £4000) shall be properly secured upon her and her children after my death." I must say, in my opinion, if any words can be said to express a clear meaning and intention—a positive undertaking and contract—these words are sufficient for that purpose; because these words are used at a time when a marriage is impending, a marriage to which the father has given his consent, which did take place shortly afterwards, and which, as cannot for a moment be disputed, did take place in consideration, among other things, of the promise which had been made by the father to settle his property in strict settlement upon the plaintiff and her children. It has been observed that the case alleged by the plaintiff in the bill that the marriage took place upon that consideration cannot be proved; and that that is shown by what afterwards took place. I should be very slow to adopt what afterwards took place as a reason to satisfy me that this allegation cannot be true; but it is proved by the mother, by the husband, and by the wife, that the marriage did in fact take place in consequence of that letter, and on the footing of that letter, and to that there is no sort of contradiction. Mr. Little has endeavored with great ingenuity, by referring to the letters which passed between the defendant, Mrs. [131] Eastwood, *the widow, and the plaintiff, Mrs. Coverdale, in the year 1868, to show that that could not have been the ground upon which the marriage took place. They do not

show any such thing. If I attached any importance to those letters, which I am not at liberty to do, as effecting the rights of the parties, I cannot safely draw any conclusion from them to the effect that Mr. Little contends for. I cannot say that because the plaintiff, if she was competent, was willing in the year 1868 to give up some of the advantages which she had stipulated for, or which somebody had stipulated for, in 1863, that therefore it was not in consideration of those latter advantages that the marriage took place. I take the evidence to be clear and distinct that the marriage proceeded upon the contract which I have read from the letter of 1863. There would have been no doubt upon the subject except from the accident that this gentleman, being, when he entered into this contract, a widower of a certain age, and not then contemplating the possibility of a second marriage, did afterwards marry again. But he could not by his marriage withdraw from his contract. That representations of this kind will constitute a contract is shown beyond the possibility of question by every case which has been referred to, as well by those in which the contract has been enforced, as by those in which the court has found it impossible to establish the contract because it rested simply in intention, or because the thing to be settled was so vague that it was impossible for the court safely to say what had been contracted for. In all the cases where the contract is clear in its terms, where the amount is not a sum to be ascertained hereafter, but is certain, as in this instance, there has been no difficulty or doubt whatever. The principle of law goes even further, as was observed in a judgment by Lord Cottenham in a case which was decided upon its own particular facts. The Statute of Frauds having been relied upon, that objection was overruled, and the case was decided on its own particular facts, in the only way, as far as I can judge, in which it ought to have been decided.

But there is also this larger principle, that where a man makes a representation to another, in consequence of which that other person contracts engagements, or alters his position, or is induced to do any other act which either is permitted by or sanctioned by the *person making the representation, the [132 latter cannot withdraw from the representation, but is bound by it conclusively. That principle, as I conceive, must apply in its fullest extent to this case. What took place between these two ladies in the way of correspondence I am not at liberty to attend to. A married woman could not, under any circumstances, bind herself; still less could she bind her children by any relinquishment, if she were capable of making a relinquishment, of rights which she then possessed. That she was

aware of her rights by no means appears; whether she was or not I think, for this purpose, is entirely indifferent. But it must be observed, also, that all the weight which could, under any circumstances, belong to that suggestion is removed, when it is recollected that the thing then talked about was a will which was made in 1868, and that the will in question, which is the subject of the present suit, was not made until 1871. So that the correspondence cannot be said in any sense to have reference to the existing will of 1871. As I have said, this gentleman, for reasons which he thought were valid and sufficient at the time, and which are not unreasonable in themselves, agreed with the intended son-in-law that he the testator, should have the control and possession of his property for his commercial and other purposes all the days of his life, and that when the day of his death arrived everything that he possessed should be the property of his only child, and then, moreover, that it should not be a mere gift to her, but that it should be so settled as to ensure a provision for herself and for her children after her. I cannot think of anything more reasonable or proper on his part, except only that he did not contemplate that he might afterwards marry. He did afterwards marry. He was in the position of Benedict in the play, who says, "When I said I would die a bachelor I did not think I should live till I were married." Except that circumstance, there is nothing in the transaction to take it out of its being a contract for valuable consideration, to be performed by the person who was bound to perform it, and liable to be performed by the person on whom the obligation lies. I think the plaintiff is entitled to a decree. There will be a declaration that the letters of Richard Eastwood amount to and constitute a contract by him for valuable consideration to settle the whole of the property of which he died seized or possessed (after payment of funeral and testamentary expenses) upon the plaintiff in strict settlement, subject to the claim of any creditor of Mr. Eastwood; with an inquiry as to the particulars of such property; then an order that a proper settlement be prepared and executed by and under the direction of the court accordingly; and that the defendants, other than the children of Mrs. Coverdale, and all other necessary parties (if any) shall join in such settlement. As the estate is being administered there is no necessity for an injunction or a receiver. The reference to chambers for a settlement will also include the £4000 offered by the husband to be settled. Proceedings will be stayed against Mr. Little's clients.

Mr. Kay, upon the question of costs, observed that if costs were allowed to Mr. Little's clients they must come out of the settlement fund, which was the property of the plaintiff and her children.

The VICE CHANCELLOR observed that the principal defendants were defending the suit by an order in the administration suit, and that if they had to pay costs they must pay them personally, which would be very hard, and allowed them their costs.

Solicitors for the plaintiff: Messrs. *Collyer-Bristow, Withers, & Russell*.

Solicitors for the principal defendants: Messrs. *Shaw & Tremellen*, agents for Messrs. *Creeke & Sandy, Burnley*.

[Law Reports, 15 Equity Cases, 134.]

V.C.B. Dec. 10, 11, 1872.

*OWEN v. DELAMERE.

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[1871 O. 10.]

Administration — Liability of an Executor who continues the Business of his Testator — Remedy of Creditor.

A testator having directed his executors, at their discretion, either to wind up or to continue his business (that of a clothier), with power to apply the capital employed in the business in carrying it on, and to employ in such business any money, part of his general estate, the executors elected to continue the business, but did not, as they said (and the contrary was not proved), employ more of the assets in carrying on the business than were so employed at the testator's death.

Upon bill by a person alleging himself to be a creditor of the business since the death, on behalf of himself and all the other creditors of the testator, seeking administration of the testator's estate which had been employed in the business, there being no suggestion of insolvency:

Held, that the remedy of the plaintiff was not an administration decree in the court, but an action at law.

CAUSE. John Tyrer, by his will, dated the 18th of August, 1859, gave the following direction: "And I direct my executors or executor, at their or his discretion, either to wind up or dispose of, or to continue either alone or in conjunction with any person or persons, any business in which I might be engaged at my death, and which I may not have bound my executors to continue; provided always that no such business shall be carried on except with the consent, in writing, of my said wife Ann. And I hereby declare that it shall be lawful for my said executors and executor, at their or his discretion, to apply the capital employed in any business which they may continue to carry on in carrying on such business, and, with such consent as aforesaid, to employ in such business any money, part of my general estate; all such capital or money so employed to bear interest at five pounds per cent per annum, payable half yearly. And I hereby declare that all profits arising from the said business, above the said interest of five

pounds per cent, shall form part of my residuary estate, and my share in all losses to be incurred in such business shall be [135] paid out of the said capital of *my residuary estate. And I hereby declare that it shall be lawful for the said trustees or trustee to employ such persons in winding up, disposing of, or carrying on any such business at such wages or salaries as they or he shall think fit. The testator died in 1859, possessed of considerable personalty, but having no real estate. The will was proved by two of the three executors, namely, Daniel Delamere and Ann Tyrer, his widow. The testator, at his death, was carrying on the business of a clothier at Beaumaris, which business he had not bound his executors to continue. The acting executors, with the consent of Ann Tyrer (she being one of them) continued this business after the testator's death. On the 7th of March, 1871, this bill was filed by Richard Owen, on behalf of himself and all other the unsatisfied creditors of John Tyrer, deceased (the testator), against Delamere and Ann Tyrer, alleging that the defendants had continued the testator's business in conjunction with his son, Robert Tyrer (since deceased), and had also employed in the business so continued not only the capital employed by the testator in carrying on the business, but also a large sum of money part of the testator's general estate; also that in the course of such continuance the business had become largely indebted, and, amongst others, to the plaintiff in the sum of £386. The bill charged that the debts of the business were, under these circumstances, debts which ought to be satisfied out of the testator's capital employed by him in the business in his lifetime, and out of the moneys, part of his general estate, which had been employed in the continuance of the business; and that the defendants had refused to pay the £386; and prayed for an administration of the testator's personal estate as in a creditors' suit, for a receiver, and, if necessary, an injunction, and for accounts. The defendants, by their answer, denied that they had continued the business in conjunction with Robert Tyrer, and said that they had employed him only as a superintendent. They admitted having employed in the continuation of the business the capital employed by the testator at his death, the amount and particulars of which they stated; but said they had employed no part of his general estate in carrying on the business. They admitted having incurred debts to sundry [136] tradesmen, which they were willing to *pay. They denied that the business was indebted to the plaintiff in a sum of £386, or in any sum. They submitted whether the debts of the business were or were not debts which ought to be satisfied out of the capital employed at the death of the testator, or out of his general estate. They were willing, "as between ourselves and

the plaintiff, but not further or otherwise," to admit, and did to that extent admit, assets. The question of whether the plaintiff had any provable debt against the estate at all was in dispute; and the evidence on this point will be found discussed in the judgment.

Mr. *Swanston*, Q.C., and Mr. *Horton Smith*, for the plaintiff: These executors were not bound to carry on any business, but they had a discretionary power, with the consent of the widow, to do so. They chose to carry on the business, and so choosing, they were empowered to use in the business not only the capital employed at the testator's death, but (with like consent) any money, part of the general estate. We say they have — they say they have not — applied part of the general estate beyond the capital employed at the testator's death. Be that as it may, to the extent to which they have applied the assets, we say that the plaintiff (assuming him to have since the death become, and now to be, a creditor) has a right to have the estate administered in equity for the benefit of himself and the other creditors subsequent to the testator's death: *Ex parte Garland* ⁽¹⁾; *Ex parte Richardson, In re Hodson* ⁽²⁾; *Cutbush v. Cutbush* ⁽³⁾; *Lindley on Partnership* ⁽⁴⁾. Supposing Robert Tyrer to have been not a partner, but only an agent, that does not absolve the executors from liability as undisclosed principals: *Thompson v. Davenport* ⁽⁵⁾.

Mr. *Kay*, Q.C., and Mr. *Bardswell*, for the defendants: The suit is a novelty, without sanction in precedent or authority. Assuming the plaintiff to be a creditor (which we deny), he cannot have administration as in a creditor's suit in this court. The *cases cited are either cases of actual bankruptcy, or, as in [137 *Cutbush v. Cutbush* ⁽³⁾], of practical insolvency. No doubt, where an executor trading with his testator's assets becomes bankrupt, not only his own estate, but the assets authorized by the testator to be employed in the business, are distributable amongst the creditors; and no proof against the bankrupt estate can be made in respect of assets so employed: *Scott v. Izon* ⁽⁶⁾. But here there is no suggestion of insolvency; and we deny the allegation that the executors have employed any of the general assets, beyond what were employed in the business at the death. *Farhall v. Farhall* ⁽⁷⁾ shows that a man cannot by contract with an executor acquire a right to prove in an administration suit as against the estate, though the executor has given him a lien on certain specific assets.

⁽¹⁾ 10 Ves., 110.

⁽²⁾ Buck, 202, 209; 3 Madd., 138.

⁽³⁾ 1 Beav., 184.

⁽⁴⁾ Pages 1053-5.

⁽⁵⁾ Sm. L. C., 6th ed. vol. ii. p., 336.

⁽⁶⁾ 34 Beav., 434.

⁽⁷⁾ Law Rep., 7 Ch., 123.

Mr. *Swanston*, in reply: There is abundant authority for such a bill as this. The leading case is *Hankey v. Hammond* or *Hammock* ⁽¹⁾, which, to the extent of the creditor's remedy against assets authorized by the testator to be employed in the business, is not displaced as an authority by the observations of Lord Eldon in *Ex parte Garland* ⁽²⁾, or of Lord Justice Turner in *M'Neillie v. Acton* ⁽³⁾. In *Thompson v. Dunn* ⁽⁴⁾, the creditor's lien on the goods employed with the testator's direction in trade, was not questioned by Lord Chancellor Hatherley. *Cutbush v. Cutbush*, was an administration suit in this court, and the circumstance that the assets are sufficient can make no difference in the principle. *Wilkes v. Lister* ⁽⁵⁾ supports the same view ⁽⁶⁾. 138] SIR JAMES BACON, V.C.: I think this suit is altogether misconceived. I think it proceeds upon principles which are not applicable to the facts of the case stated. The case upon the bill is this: The plaintiff claims to be entitled as a simple contract creditor in respect of money lent and advanced, or paid and laid out, nominally on behalf of one person but really on behalf of the defendants — a simple case in which, if it be true, he can recover in an action at law, without the slightest difficulty. It is quite true that the testator did commit his estate to the care of his executors, with an authority to them to carry on business. What is the consequence of that? They carry on the business; they carry it on upon their own responsibility, and they have the testator's estate as a capital with which they can trade. How does that concern the creditors? The creditors have a right to be paid by the persons with whom they have contracted. They contracted, the plaintiff says, with Robert Tyrer, who represented the firm, who was either principal, or agent with undisclosed principals. There is no difficulty in bringing an action at law; it is, as stated in the bill, as clear and plain a case in respect of a simple contract, as can be. The plaintiff says that the business was carried on, and that the testator's estate was employed in it. In the 4th paragraph it is stated, "In the course of such continuance and carrying on of the said business as aforesaid it has become largely indebted, and (amongst others) the said business is indebted to the plaintiff in a sum of £386." That can only be in respect of the contract which the plaintiff alleges in the bill. The sum

⁽¹⁾ Buck, 210; 3 Madd. 148, n.; 1 Cooke Bank. Law, 67.

⁽²⁾ 10 Ves., 121.

⁽³⁾ 4 D. M. & G., 744, 752-3.

⁽⁴⁾ Law Rep., 5 Ch., 573, 576.

⁽⁵⁾ 6 Esp., 78.

⁽⁶⁾ To the above cases may be added *Thompson v. Andrews* (1 My. & K., 116);

and *Gavin v. Hadden* (Law Rep., 3 P. C., 707). It has been ascertained that, in the case of *Thompson v. Dunn* (Law Rep., 5 Ch., 573), upon the accounts being furnished the plaintiffs abandoned further prosecution of the suit, which was never brought to a hearing.

can easily be recovered at law, and there is no reason in the world why a bill should be filed in this court. The case of *Hankey v. Hammock* ⁽¹⁾ does not appear to me, as far as it goes, an authority that applies to the present. The extent of the authority of that case is greatly questioned by Lord Eldon in *Ex parte Garland* ⁽²⁾; but without waiting to observe upon this, it is sufficient to say that that case is totally different from the present; the testator there having appointed executors, and having authorized them to entrust his wife to carry on the trade, which for a time she did carry on, and debts having been no doubt contracted in the course of *carrying on that [139 trade. Then came in the executors, and said, "You shall do this no longer," and took possession of the whole estate. The bill there was filed for the purpose of making available claims against the trust estate of which the executors possessed themselves; they not being personally liable, in the slightest degree to the plaintiff. The plaintiff was interested in the trust they had to execute, and for that purpose he came against the trust estate. *Ex parte Richardson* ⁽³⁾, and especially *Ex parte Garland* ⁽²⁾, which contains a clear, distinct, luminous exposition of law on the subject, show that such transactions are of this nature: An executor authorized to carry on business, carries it on; he is liable for every shilling on every contract he enters into; besides that, if he becomes bankrupt, the persons who have trusted him have a right to say that that portion of the trust estate which was committed to him for the purpose of carrying on the business shall not be the subject of general administration. It is not the general estate of the testator, as in *Ex parte Richardson*, that is liable to this equity, but only so much as he has authorized to be employed in the business. There can be no proof whatever on the part of the testator's estate against the bankrupt estate, unless the executors have gone beyond the limit of their trust; in which case the amount of excess may be proved for in the bankruptcy as a debt due to the estate of the testator. These principles are clearly and distinctly laid down in *Ex parte Garland*, are confirmed in *Ex parte Richardson*, and adopted in *Cutbush v. Cutbush* ⁽⁴⁾. There can be no doubt about the principles on which a court of equity deals with a case, not like that before me, but a case in which the same elements are contained; that is to say, the court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose. As Lord Eldon points out in

⁽¹⁾ Buck, 210; 3 Madd. 148, n.

⁽²⁾ Buck, 202; 3 Madd., 138.

⁽³⁾ 10, Ves., 110.

⁽⁴⁾ 1 Beav., 184.

the case of *Ex parte Garland*, the creditor has not only the personal remedy against the executor, but he has a right also, if that should fail, to come against the trust estate; and so, here, [140] if an action had been brought against *these defendants, and a fruitless judgment had been recovered against them, there would have been a right to go against that trust estate which the testator committed to the executors, if it should be in existence, in specie. No such case is stated upon the bill.

The evidence in support of the claim is, no doubt, excessively feeble; it does not at all amount to the proof of a debt. If it did, it would still not be recoverable in this form. What the plaintiffs are entitled to is, to be paid, by the persons with whom they have contracted, the amount which is due on the contract—that, and no more. The law is very clearly established in the case I have referred to; and I think the evidence in this case, if it were not so, is wholly deficient, because, without criticising too minutely the circumstances mentioned in Mr. Roberts' affidavit, I do not think that it is made out that the money is due from the business. If creditors of the business—persons who trusted what is called “the business”—had sued the business or the representative of the business, and had recovered judgment, and then a loan had been made to satisfy those judgments, what might have been something like a case. It is not so. What is said here is only that the first sum of £12 7s. therein appearing was a sum paid by Richard Owen to Messrs. Field & Co. solicitors, of Lincoln's Inn Fields, London, for debt and costs in an action against Robert Tyrer, brought by one Bowen, for trade goods supplied to the firm or business of Tyrer & Son; that is to say, brought against Robert Tyrer, who, for anything that appears, may have had the money from Tyrer & Son, and ought to have paid it, but neglected to pay it, and therefore was sued for the sum he owed. The other two sums of £70 and £10 are not stated so positively as the first; but the deponent says those sums, “as I believe,” were advanced by Robert Owen. That can only be from Robert Owen's information, and from no knowledge of his own, as I must understand from what he says: “The sums of £70 and £10 were also advanced by the said Richard Owen, as I believe, to satisfy a claim of Messrs. Jones & Co., of Liverpool, clothiers, who had supplied the said business of Tyrer & Son with trade goods; and the said claim was therewith satisfied.” That, in my opinion, carries it no further, and is no proof of a loan for the purposes of the concern. [141] * “The item of £32 16s. was advanced by the said Richard Owen to pay off one Frederick Bidgood, an execution creditor, who had recovered judgment in an action for trade goods supplied to the said business of Tyrer & Son, and had put an exe-

cution on the premises, as appears by the warrant now produced and shown to me marked A. The claim was satisfied with the said money, and the stock-in-trade and other property on the premises which had been seized were released." The execution was against Mr. Robert Tyrer alone. What possible right had they to seize those goods, which were not the goods of Robert Tyrer alone, or of his principals or servants? There was an execution put into the premises, and it was satisfied, and Mr. Owen is supposed — I say "supposed" — to have lent the money to stay that. If it stood, therefore, on the evidence, I should say the evidence was not sufficient to establish the character of creditor on the part of the plaintiff. It is not on that point that I deal with this case, but on the ground I have mentioned before — that the bill states a simple contract debt, for which the defendants are liable, either through their agents — they being undisclosed principals — or otherwise, it is quite immaterial which — they having carried on the business, as they admit they did, or as it is alleged by the bill they did, and having become indebted for money paid and advanced on account of the business. In my opinion, if any such claim exists (I do not say whether it does or not), it ought to have been pursued by an ordinary action at law, and there is no reason in this case why recourse should be had to the estate of the testator, which the defendants say is sufficient to satisfy the demand, and when the defendants say they are able, willing, and ready to satisfy any demand that may be made against them. I am of opinion, therefore, that the bill must be dismissed with costs.

Solicitors for the plaintiff: Messrs. *Sharp & Ullithorne*, agents for Messrs. *Owen & Roberts, Beaumaris*.

Solicitors for the defendants: Messrs. *Wright & Venn*, agents for Messrs. *Payne & Son, Liverpool*.

See 4 Eng. Rep., 927, note.

[Law Reports, 15 Equity Cases, 142.]

V.C.W. Nov. 4, 5, 1872.

*BROWN v. WALES.

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[1872 B. 209.]

Discovery — Identity of Parcels — Lessor and Lessee — Multifariousness.

Bill by a reversioner against overholding tenants under expired underleases, alleging that the defendants were wrongfully in possession of certain parcels comprised in the original lease, and had in their possession divers documents which would show that the said parcels were comprised in the said lease and the underleases, but refused to produce them, and were colluding together to defeat

the plaintiff. The defendants demurred generally and for multifariousness, but the court overruled the demurrers.

Identity is as much matter of title as devolution.

By an indenture of lease, dated the 17th of June, 1763, Deborah Bryon and John Piston, being entitled as tenants in common to certain lands at Walworth, demised to Thomas Clutton a parcel of ground at Walworth, and also certain closes known as Walworth Fields, containing eight and a half acres, another close containing two acres, and another close containing seven and a half acres, lying dispersedly in Lock's Fields, for ninety-nine years from St. John the Baptist's day then next ensuing, at a rent of £50 per annum. The lease contained a provision against digging brick earth under a penalty of £500. Clutton took possession under the lease, and by an underlease, dated the 1st of October, 1763, he demised to one William Odber all those parcels of meadow land, situate, lying, and being dispersedly, containing seven and a half acres, from the 29th of September, 1763, for the term of ninety-six years, at a rent of £15 per annum. By an indenture, dated the 25th of March, 1785, Clutton, for considerations mentioned in the deed, assigned the said seven and a half acres to Wright for the then residue of the term of ninety-nine years (but subject to the said underlease), and covenanted to pay the rent of £50 reserved under the lease of the 17th of June, 1763. All the property comprised in the lease of the 17th of June, 1763, became vested in Margaret Piston, and by indentures of lease, dated the 7th and 143] 8th of February, 1776, were settled, on her *marriage with Mr. Richard Clark, upon the wife and husband for life and issue of the marriage. In 1839, John Crosby Clark, the surviving son, became entitled to one moiety absolutely, and to the other as tenant in tail. By indenture of lease and release, dated the 24th and 25th of April, 1839, duly enrolled, he barred the estate tail, and acquired the absolute interest in all the property comprised in the lease of the 17th of June, 1763. The lease of the 17th of June, 1763, expired on the 24th of June, 1862. The rent reserved thereby had been always duly paid, and on the expiration of the lease all the property comprised in the said lease except the seven and a half acres comprised in the underlease of October, 1763, were delivered up to Mr. Clark, and shortly afterwards a further portion, part of the seven and a half acres, called Salisbury Row block, but owing to the difficulty of proving that certain other properties were included in the seven and a half acres, he never obtained possession of them. Mr. Clark died on the 31st of July, 1869, and under the residuary devise in his will the plaintiff became entitled to the whole of the seven and a half acres comprised in the underlease to Odber, except a portion thereof called the

North Street block, which the testator had disposed of in his life time. The land comprised in the underlease of October, 1763, had been built over, and had become changed in character.

William Odber, by indentures, dated the 20th of March, 1801, and the 23d of December, 1802, demised separate parcels of land, being parts of the said seven and a half acres, to a Mr. Brandon, and Mr. Roddis. By his will, dated the 17th of November, 1806, he bequeathed his leasehold estates lying in Lock's Fields to Griffith, Shepherd, and Rosseter, on trust to pay the rents to his daughter, E. Hall, for life, and after her decease on trust to sell his leasehold estate either by public sale or private contract. Rosseter, the surviving executor, in 1824, the testator's daughter being then dead, caused all the leasehold property comprised in the underlease of October, 1763, being the said seven and a half acres, to be offered for sale by public auction in three lots, No. 2 of which was purchased by a Mr. Poole, and No. 3 by a Mr. Bicknell. On the 8th of March, 1825, the remaining lot, No. 1, was sold to a Mr. Pugh, who, by the conditions of sale, was to take an assignment of the *underlease of October, 1763, subject to underleases [144 of lots 2 and 3 to Poole and Bicknell. On the completion of the sale, the original underlease and the counterparts of certain other underleases were delivered to Pugh. Prior to 1859 the defendant Wales purchased from Pugh, or his representatives, all the leasehold parcels and premises comprised in the underlease of October, 1763, and by an indenture, the date and particulars of which the bill alleged were unknown to the plaintiff, all the parcels and premises contained in the underlease of October, 1763, were assigned by Pugh to the defendant Wales. On this occasion divers deeds and documents showing the devolution of Pugh's interest were, as the bill alleged, handed over to the defendant. Between this purchase and 1859, the defendant Wales acquired Wright's interest under the indenture of the 25th of March, 1785; and by an indenture, unknown to the plaintiff, all the premises comprised in the underlease of October, 1763, under the description of seven and a half acres pasture land lying dispersedly in Walworth Fields, were assigned to the defendant for the then residue of the term. On this occasion various deeds and documents showing the devolutions of title were delivered over to the defendant Wales. The defendant Wales, subsequently to his purchase from Pugh, or his representatives, of the premises comprised in lot 1, which included the whole of the parcels contained in Odber's underlease, dated the 1st of October, 1763, *i.e.*, the whole of the seven and a half acres, subject to numerous sub-leases, also acquired, by purchase or surrender, those

portions sold by Rosseter to Bicknell and Poole. The original underlease to Odber expired on the 1st of October, 1859. In 1862 the interest derived from Wright's lease, dated the 25th of March, 1785, also expired when the plaintiff became entitled to the whole of the parcels comprised in the original lease, dated the 17th of June, 1763. The defendant Wales, on being applied to to deliver up possession of the different premises comprised in the underlease of October, 1763, alleged that he had previously sold his interest in some of the parcels to Messrs. Snewin and Brown, and in others to one George Beard, who was his son-in-law (since dead and now represented by his executrix, Wales's daughter. As to these sales, the bill alleged that they were colorable, that the property was still managed by Wales, and the alleged vendees were trustees for 145] *him, and alleged that the defendant Wales had colluded with the other defendants, and had delivered over certain documents to enable him to resist the plaintiff's claim. The bill alleged that the defendants were in wrongful possession of certain portions of the seven and a half acres included in the said original lease of the 17th of June, 1763; that they were well aware that the said parcels were included in such lease, and also in the underlease of October, 1763; and that they had in their possession or power "divers documents and papers which, if produced, would clearly show that the said parcels were so included in the said lease and underlease, but they refuse to deliver up possession of the said parcels, or any of them, or to produce the said documents for the plaintiff's inspection, or to afford him any information respecting the said parcels, documents, or papers. The said documents contain accurate descriptions of the said seven and a half acres." The bill prayed that the defendants respectively might make a full discovery. All the defendants demurred to the bill generally, and for multifariousness.

Mr. *Lindley*, Q.C., and Mr. *Bradford*, for the defendants *Wales* and *Brown*, the alleged purchasers.

Mr. *Dickinson*, Q.C., and Mr. *Ferrers*, for the defendant *Snewin*, the co-purchaser with *Brown*.

Mr. *Miller*, Q.C., and Mr. *Davey*, for the defendants *Beard*, the daughter of *Wales*: This is a bill for discovery, but an unusual one. The plaintiff has the original lease of the 17th of June, 1763, or the counterpart. He alleges in the bill that he knows his title, and does not ask any relief in respect of that, but he wants the defendants to prove for him his right to particular parcels. The answer to this is, that the defendants are under no obligation to give up the muniments as to intermediate dealings with the property, neither would the documents in ques-

tion show the plaintiff's title. Secondly, he asks what he can obtain at law in the action which he intends to bring. The Common Law Procedure Act, s. 36, *provides that in all [146 actions or proceedings the judge may compel a party to allow an inspection of documents in all cases where a bill for discovery might have been filed. Thirdly, the demurrer must be allowed for multifariousness. It may be that the plaintiff might include all the defendants in one action, but the defense of each must necessarily be separate, and there would be four distinct actions in which the defendants would be the only witnesses except as to one action. The demurrer must, therefore, be allowed: *Fenton v. Hughes* ⁽¹⁾; *Story's Eq. Pl.* ⁽²⁾.

The *Solicitor General* (Sir G. Jessel), Mr. Greene, Q.C., and Mr. Hanson, for the bill: It is not necessary to entitle the plaintiff that the matters for which discovery is sought should relate to title. It is enough if it be in aid of the case made by the bill, even though they may affect defendant's title, and where it is denied that they would establish plaintiff's title: *Smith v. Duke of Beaufort* ⁽³⁾; *Earp v. Lloyd* ⁽⁴⁾; *Jenkins v. Bushby* ⁽⁵⁾. Further, this is a case between landlord and tenant, and it is the duty of the latter to preserve boundaries: *Attorney General v. Fullerton* ⁽⁶⁾. On the objection as to multifariousness, the bill distinctly alleges that the defendants are colluding together to defeat the plaintiff. Such an objection, therefore, cannot be maintained.

Mr. Lindley, in reply.

SIR JOHN WICKENS, V.C.: I am of opinion that these demurrers must be overruled. The object of the bill is to obtain discovery so as to enable the plaintiff to recover possession of part of the property comprised in the original lease of June, 1763, which, it is alleged, is wrongfully withheld. According to the statements of the bill, parts of the seven acres and a half cannot, by reason of building and alterations, *be identi- [147 fied without the production of the instruments, or some of them, which have been from time to time executed in dealing with the property. The defendant Wales refuses to give any information. In this state of things the plaintiff has filed this bill for discovery. It is said that the plaintiff does not ask discovery in aid of his title, but in order to discover what he is entitled to; and that the documents are essentially the defendant's title and not the plaintiff's: but identity is as much a part of title as devolution. Suppose, for example, a map on the lease or the counterpart, that would be as much a part of title as the opera-

(1) 7 Ves., 287.

(2) 5th Ed. p. 287.

(3) 1 Hare, 507.

(4) 3 K. & J., 549.

(5) 35 L. J. (Ch.), 400.

(6) 2 V. & B., 263.

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tive part of the deed. On general grounds, therefore, I should hold that these demurrers must be overruled. But, independently of that, there is in the relation of lessor and lessee a principle which distinguishes cases between them from other cases. A lessor is entitled to have the boundaries kept distinguished on the principle laid down in *Attorney General v. Stephens* ⁽¹⁾. Then, on the question of multifariousness, it is observed that to a bill of discovery it is an ultra-technical objection, even if well founded. In the present case it is alleged, and admitted by the demurrer to be true, that Wales and the other defendants are colluding together to resist the plaintiff's claim. And in *Campbell v. Mackay* ⁽²⁾ it was held that, in dealing with objections of this class, the court has a wide discretion, and allows them only where real inconvenience would result from what is objected to. The demurrer must be overruled, with leave to plead and answer in two months. Of course this will not deprive the defendants of any rights they may have as to privilege.

Solicitors for the plaintiff: Messrs. *Paterson, Snow & Burney*.

Solicitors for the defendants: Messrs. *Rooks, Kenrick & Harston*.

[Law Reports, 15 Equity Cases, 148.]

M.R. Feb. 25, 1873.

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*EAGLES V. LE BRETON.

[1861 E. 68.]

Will—*Gift* "to my relatives"—*Time when Class to be ascertained*—*Joint Tenancy*.

Testatrix directed all her property at the death of A and B "to pass to my relatives in America:"

Held, that the class was to be ascertained at the death of the testatrix; and that all her next of kin in America then living were entitled as joint tenants.

CATHARINE CHAMBERS, by her will, devised all her real estate to her sisters, Jane Coucher and Anne Peppin, absolutely, as tenants in common; and also gave to them the residue of her personal estate. By a subsequent testamentary instrument the testatrix gave the following direction: "At the death of my sisters, Anne Peppin and Jane Coucher, the residue of my property is to pass to my relatives in America." Jane Coucher died in the lifetime of the testatrix. In 1857 the testatrix died, leaving Anne Peppin her surviving, who died in 1859. There were thirteen persons living at the death of the testatrix who were her next of kin, and who answered the description of her "relatives in America." Of these one predeceased Anne Peppin, and several died subsequently. The suit was instituted by the plaintiff, the legal personal representative of the testatrix, for the administration of her estate; and the questions now submitted to the court on further consideration, were, first, when

(1) 6 D. M. & G., 111.

(2) 1 My. & Cr., 603.

V.C.M.

Corporation of Folkestone v. Woodward.

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the class of persons taking on the death of the tenant for life was to be ascertained; and, secondly, whether they took as joint tenants or tenants in common.

Mr. *Fischer* Q.C., and Mr. *Alexander*, for the plaintiff.

Mr. *Fry*, Q.C., Mr. *Busk*, and Mr. *C. Brown*, for other parties.

Mr. *Roxburgh*, Q.C., and Mr. *Simmonds*, for the surviving relatives of the testatrix in America: The words "my relatives" are equivalent to "next of kin," *according to the statute [149 of distributions. Those who were living at the death of the testatrix were entitled to take as joint tenants: *Bullock v. Downes* (1).

Mr. *W. Pearson*, for the legal personal representatives of one of the "relatives" of the testatrix who survived her, but predeceased the tenant for life: The class of persons entitled under this gift must be ascertained at the death of the testatrix, when all her relatives in America then living took as tenants in common. In *Lucas v. Brandreth* (No. 2) (2), though the words of the settlement then under consideration were held to import joint tenancy, yet your lordship laid down, that when there was an implied reference to the Statute of Distributions the next of kin took as tenants in common. I submit that the same rule applies here, and that the relatives who would have taken under the Statute of Distributions must take according to that statute as tenants in common.

Mr. *Routh*, for the personal representative of one of the class who survived the tenant for life and afterwards died.

LORD ROMILLY, M.R., held that the class was to be determined at the death of the testatrix; and that the next of kin of the testatrix in America then living were entitled as joint tenants.

Solicitors: Messrs. *Tamplin & Tayler*; Mr. *Rivolta*.

(1) 9 H. L., 1.

(2) 28 Beav., 274.

[Law Reports, 15 Equity Cases, 159.]

V.C.M. Nov. 7, 14, 1872.

*CORPORATION OF FOLKESTONE V. WOODWARD.

[159

[1872 F. 90.]

*Church — Building — Owner — Local Improvement Act — Line of Building —
Setting back Houses — Delay in exercising Powers.*

The corporation of Folkestone had power, under the Folkestone Improvement Act, 1855, to prescribe the line in which any house to be thereafter built or taken down for the purpose of being rebuilt or altered should be erected, on payment of compensation to the owner of any house required to be set back, and it was also provided that no new street to be thereafter laid out should be of less width than forty feet, inclusive of footways, and in the case of existing streets, houses to be thereafter erected were to be set back so as to allow of a width of forty feet

Held, that a church was a house, and a perpetual curate in whom the freehold of the site was vested under 43 Geo. 3, c. 108, an owner within the meaning of the act.

A temporary church fronting to a road within the borough less than forty feet wide having been pulled down with a view to erecting a permanent church, the corporation gave notice to the clergyman in charge at the time, of a resolution passed by them that the road on which the church abutted must be not less than forty feet wide; but there was no statement that the additional width was to be gained on the side on which the church abutted, and it appeared that the street might have been widened on the side opposite without removing any buildings.

Afterwards, but not till the foundations of the new church had been put in, the corporation prescribed a line of building which came within the limits of the church as designed:

Held, that they were too late, and could not restrain the erection of the church in the manner in which it had been commenced.

THIS was a motion for an injunction to restrain the defendant, who was the perpetual curate of the parish of Folkestone, from building a church in such a manner as to reduce a street, called the Dover road, to a less width than forty feet, the corporation offering to pay to the defendant any loss or damage he might sustain in consequence of not being able to build up to the full extent of his land. The plaintiffs, the corporation of Folkestone, had, under the Folkestone Improvement Act, 1855, certain general powers of regulating the width of streets [60] and controlling the mode of construction *of any new buildings in the borough. The act contained the following provisions: "28. This act shall be executed by the corporation acting pursuant to the powers and provisions of the Municipal Corporation Acts." "48. The Towns Improvement Clauses Act, 1847" (except clauses 50 and 103, and the proviso to clause 107), "shall be incorporated with the act." "50. In every case where the width of any street shall not be forty feet, it shall be lawful for the corporation, whenever it shall appear to them expedient, to prescribe the line in which any house to be hereafter built or taken down for the purpose of being rebuilt or altered, shall be erected, and the same shall be erected in accordance therewith, and the corporation shall pay or tender compensation to the owner or other person immediately interested in such house for any loss or damage he may sustain in consequence of his house being set back, the amount of such compensation, in case of dispute, to be settled in the same manner as compensation for lands to be taken under the provisions of this act is directed to be settled." "69. No new street to be hereafter laid out shall be of less width than forty feet, inclusive of the footway, and in case of any existing street, or of any part of such street not being of the before mentioned width, and not being built upon on either side, or only on one side thereof, the houses to be hereafter erected on any part of any such street shall be so set back as to allow of the street being

widened to the before mentioned extent of forty feet : Provided always, that the corporation shall make full compensation to the owner of the land upon which any such house is to be so set back for any damage he may thereby sustain." The corporation were also the urban sanitary authority within the district of the borough of Folkestone under the Public Health Act, 1872.

By an indenture of the 10th of July, 1865, a piece of land, triangular in shape, and bounded on three sides by streets, none of which were as much as forty feet in width, was vested in the defendant and his successors, under the provisions of 43 Geo. 3, c. 108, as the site of a church or chapel to be erected thereon, and*forever thereafter used as a church or chapel for the [161] parishioners of the parish of Folkestone. Shortly after the date of the deed the defendant erected on part of the land a temporary wooden building, which was from that time used as a church till April, 1872, when he was in a position to build a permanent church, for which plans were accordingly prepared. On the 22d of April, 1872, a plan, said to be a mere rough sketch, but showing the proposed means of ventilation, was, in accordance with sect. 110 of the Towns Improvement Clauses Act, 1847, submitted to the Corporation, who passed the following resolution : "*Resolved*, that the town clerk be instructed to signify to Mr. G. F. Bodley, architect, the approval of this committee of the plan submitted by him in pursuance of the 110th section of the Towns Improvement Clauses Act, 1847, showing the manner proposed for the construction of St. Michael's Church with respect to the means for supplying fresh air, and the general mode of ventilation of such church." The town clerk accordingly signified the approval of the plaintiffs to Mr. Bodley.

In May or June, 1872, the temporary church was pulled down. On the 17th of June the corporation passed the following resolution : "That the width of the several roads upon which the proposed new church of St. Michael will abut must be of not less width than forty feet, inclusive of footways;" and the resolution was brought to the knowledge of the clergyman who was then acting for the defendant as minister in charge of the church. The defendant then commenced putting in the foundations of the permanent church. It was entirely within the land conveyed to him, but occupied rather more ground than the temporary church had done, and was so placed as not to leave room for the enlargement of the Dover road to the full width of forty feet by widening it on that side. It was stated, however, that exactly opposite to the church there were no buildings, and it would be possible to gain the required extension by taking a small portion of the playground of a school.

162] *On the 22d of July a meeting of the corporation was held at which the defendant was present, and the question of the mode of building the church was discussed. Some further negotiations took place, in the course of which proposals were made for altering the position of the church so as to leave a clear space of forty feet for the roads round it, but no agreement was come to. On the 5th of August, 1872, the corporation prescribed the line of building for any building thereafter built, or taken down for the purpose of being rebuilt or altered, on the Dover road frontage, and on the 6th of August they sent a plan to the defendant showing the prescribed line so far as it affected his property. It comprised a portion of the site of the new church. The building appeared to have been stopped for a time during the negotiations, but on the 21st the defendant wrote to the corporation to the effect that he had obtained the opinion of counsel in favor of his right to build the church in any position he thought fit. The bill was filed on the 3d of October, 1872, and an interim order obtained, and on the 7th of November, on the present motion being opened, the vice chancellor directed that an intimation should be given to the corporation of his opinion that they might with great propriety, without waiving their strict legal rights, consent to the building being erected as proposed by the defendant. The corporation, however, did not accede to the suggestion, and the motion now came on.

Mr. Fooks, Q.C., and Mr. Ince, for the plaintiffs: The corporation having determined to put their act in force with respect to prescribing the width of the Dover road, are bound to carry it out, and the building having been pulled down which previously existed on this plot of ground, they have no option left as to whether they will allow the new church to come within the prescribed limits. It will perhaps be objected that a church is not such a house as was contemplated by the act, but the word "building" would certainly include a church; and where similar provisions are contained in public acts — as, for instance, the Act of 10 & 11 Vict. c. 84, ss. 74 & 75 —

163] houses and buildings are used as synonymous terms. *The corporation might also exercise the powers conferred by sects. 34 & 35 of 21 & 22 Vict. c. 98, under which a church would beyond question be included. If the balance of convenience or inconvenience is to be considered, that of the public must outweigh the mere alteration in the foundations of the church, especially as the corporation offer to make compensation for any damage done.

Mr. Glasse, Q.C., and Mr. Bedwell, for the defendant: This is a question of statutory jurisdiction, and the corporation can-

not go beyond their powers: *Frewin v. Lewis* ⁽¹⁾. They rely upon sect. 50 of the Folkestone Improvement Act, 1855. A church is not within the provisions of that section, and no one can be the owner of a church in the sense in which the word is there used: *Angell v. Vestry of Paddington* ⁽²⁾. There is in fact no person to be compensated as owner. A church is not made a house within the provisions of the act merely by being called in the bill a house to be used as a church. Then the action of the corporation came too late. There was nothing in the notice that Dover road was to be forty feet wide to lead to the inference that the church was to be set back, because the street might have been widened on the opposite side, and it was too late after the foundations of the church had been put in to prescribe the line of building. Under the circumstances, if the court has a discretion, it will not exercise it in favor of the plaintiffs.

Mr. *Fooks*, was only called on to reply on the question whether the corporation were in time in prescribing the line of building.

SIR R. MALINS, V.C.: The questions raised by this motion are of very considerable public importance. In the year 1865 a piece of land was voluntarily and formally conveyed to Mr. Woodward, who was then and is still perpetual curate of Folkestone, as the site of a church which was then to be erected. It appears that shortly afterwards a temporary building was *erected, and from that time was used as a church till the [164] spring of this year, when it was resolved to take it down and to erect upon the site a permanent substantial church. This church abuts on the one side upon the Dover road, and on the other side on other streets. The only point now in contest relates to the Dover road. The corporation of Folkestone are the governing body in this matter for applying the acts of parliament for public health and public improvement, under which they have very considerable powers. Various sections of the acts of parliament have been referred to in argument; and it has been conceded that the governing body have the power of prescribing the line of a new building. Mr. *Glasse*, and Mr. *Bedwell*, have argued that although those powers may apply in general, they do not apply to a church. But if they are right in the construction of the acts of parliament in that respect, the consequence would be that wherever a church is to be erected the corporation or the governing body have no control over it, and the owner of the land may build to its full extent, although that may have the effect of absolutely obstructing the public traffic. It is impossible that this can be the meaning of the legislature. And although the acts of parliament are in several respects defectively worded, and give a definition of a house not in terms

⁽¹⁾ 4 My. & Cr., 249.

⁽²⁾ Law Rep., 3 Q. B., 714

covering and including a church, yet even if it were necessary to come to a conclusion upon the act of the 11 & 12 Vict. c. 63, I should be obliged to decide that a church is a building within the meaning of the act. Mr. Ince cited an act which I think is conclusive upon the subject, 21 & 22 Vict. c. 98, which is made part of the former act, and by sect. 35 enacts that when any house or building has been taken down in order to be rebuilt or altered, the local board may prescribe the line in which any house or building to be thereafter built shall be erected, and then provides for the payment of compensation for setting back any house or building. It was argued, with reference to a person about to build a church, who in the present case is Mr. Woodward, that neither he nor anybody associated with him was the owner [65] of the land; and in *support of this argument that case of *Angell v. Vestry of Paddington* ⁽¹⁾ was relied upon. That case decides that those who represent the church are not owners so as to be liable to pay taxes or rates, and, in my opinion, has no bearing on a case like this, where the object of the act is to have all new streets of a certain width for the purposes of public health and convenience. I come, therefore, to the conclusion that upon the old act, as well as that of 21 & 22 Vict. c. 98, a church is a building within the provisions of these acts of parliament.

The corporation then have recourse to the Folkestone Improvement Act, 1855. [His honor then read the 69th section of that act and the resolution of the corporation of the 17th of June, 1872, and continued:] I rather infer from the meetings which subsequently took place that Mr. Woodward must have entertained the idea that the corporation would probably take part of his land; but they never gave him notice of their intention to prescribe the line within which buildings should not be erected, and they did not at that time prescribe any line. There is no evidence to show that there was not abundant power and means of having a road forty feet in width without in the slightest degree touching Mr. Woodward's land; and, in answer to a question I asked, it appeared that, if Mr. Woodward were to build up to the extreme limit of his land, there would still be plenty of means of making a road forty feet in width at this particular place, because upon the opposite side of the road to the church there are no buildings. Now the new church is not built exactly upon the site of the old church, because it is to project two feet further towards the Dover road, but it is entirely within the defendant's land. Some meetings are relied upon as giving him information that he is not to build up to the limits of his own land, but he is, at all events, not told how much short

(1) Law Rep., 8 Q. B., 714.

of the extremity of his land his building is to be placed, and it is not till afterwards that the corporation lay out the line of building under the powers with which they are armed. I have already intimated my opinion, and I *repeat that [166 where powers such as those of prescribing the width of streets are vested in corporations the court has no right to control the exercise of those powers unless they are corruptly or fraudulently used. Now what powers have they? [His honor then read the 50th section of the Folkestone Improvement Act, 1855, and continued:] I assume that, as far as I can see is the case, that the corporation are acting conscientiously in the matter, that is, fairly and honestly, to the best of their judgment; but I am bound to say that they appear to me to take an extreme view of the necessity of the case, because the act only directs the line to be laid out "if it shall appear to them expedient." [His honor then referred to the reconsideration of their position by the corporation at his suggestion, and certain modifications they had made in their plans in consequence, and to the facts bearing on the question of the requisite width of the streets, and continued:] I think they might very well have refrained from laying down the line in the way they have done, but they had the right to do so. It is what they deem expedient that has to be complied with. But where the corporation insist, as in my opinion they do, upon an extreme exercise of their powers, that is very good ground for saying that they should be themselves treated strictly. They determined on the 17th of June that the width of the road should be forty feet; but they did not then exercise their parliamentary power of laying out the line and tell Mr. Woodward that there was a strip of his land on which he must not build. Although there were negotiations going on until the time that they laid down the line of building, and thereby prohibited any building beyond that line, I take it that, either as a private individual or the representative of the church, Mr. Woodward was up to that time at liberty to go on building on every inch of his own land, and was committing no wrong by doing so. They must act in proper time, and if they are not vigilant they must take the consequences. Upon the evidence, I am bound to assume that the foundations, were laid, and the building had made considerable way, on the 5th of August, when, for the first time, the line was prescribed. Mr. Fooks urged in his reply that the corporation might lay down the line whenever, in point of time, they thought *fit; but the act only means that [167 they may do so in any case they think fit. They are not to allow the landowner to erect the building, and then to lay down the line. Therefore, thinking that the corporation are

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unnecessarily vigilant for what they call the public interests, and are unreasonably exercising the powers vested in them, though I cannot for that reason interfere with them, yet they, on the other hand, must be treated strictly, and they come too late. The motion for the injunction must accordingly be refused.

Solicitors: Messrs. *Tulbot & Tasker*; Messrs. *Tanqueray-Wil-laume & Hanbury*.

As to when the owner of lands will be restrained from building beyond a certain line. See Moak's *Van Santvoord's Pleadings*, 317.

[Law Reports, 15 Equity Cases, 167.]

V.C.M. Jan. 20, 1873.

PUDSEY COAL GAS COMPANY v. CORPORATION OF BRADFORD.

[1872 P. 192.]

Gas Company — Municipal Corporation — Limit of Powers — Injury to Private Individual — Right to maintain a Suit.

A municipal corporation having, under the provisions of an act of parliament, bought up a gas company which previously supplied gas to the borough, and which had compulsory powers for the purpose within the borough, commenced supplying gas to an adjoining township, in which another gas company already existed having similar powers, within the township. The gas company of the township having filed a bill against the corporation to restrain them from supplying gas within the township, and alleging as a personal injury which entitled them to maintain their suit, that the corporation had contracted to supply gas to a particular manufactory within the township which otherwise they must have supplied, and that they had thereby been deprived of the profits arising from the supply of gas to the manufactory, and that great loss would be sustained by them:

Held, on demurrer, that the injury alleged was not such as entitled the plaintiffs to maintain the suit.

DEMURRER. This was a bill by the Pudsey Coal Gas Company, incorporated by the Pudsey Gas Act, 1855, for the purpose of providing gas within certain limits therein specified. And it was by the same act enacted that the limits within which the act might be put in force by the company should be the 168] townships of Pudsey and *Calverley-cum-Farsley, in the parish of Calverley, in the West Riding of the county of York. The township of Pudsey adjoins the borough of Bradford. The defendants were the corporation of Bradford, and, by the Bradford Corporation Gas and Improvement Act, 1871, were authorized to purchase the undertaking, works, and property of the Bradford Gaslight Company, which was a company originally formed under an act of 3 Geo. 4, the powers of which were subsequently extended by an act of 8 Vict. By the former of these acts the company was established for the purpose of producing gas for lighting the town of Bradford and the townships of

Manningham, Horton, and Bowling, within the parish of Bradford; and they were empowered to contract for the lighting with gas the town, townships, and parish, any or either of them, or any public streets, squares, highways, market-places, courts, yards, passages, lanes, private houses, shops, inns, taverns, counting-houses, warehouses, and public works and manufactories and other buildings, of whatever denomination the same might be, or any of them, within the said town, townships, and parish, any or either of them respectively. The company was further empowered to erect works and to break up streets lay pipes, and do similar acts along such places as aforesaid, and in such manner as should be necessary for carrying the act into execution. But it was enacted, that nothing in the act should extend to authorize or empower the company, or any of their officers, agents, or servants, to break up the soil or pavement of all or any part of any of the public streets, squares, market-places, highways, or other public places in the said town, townships, and parish, which then were or thereafter might be maintained and supported in repair by and under the control and direction of any surveyors of highways or other person, or any commissioners or trustees under any act of parliament, without having first obtained their consent.

By the Bradford Corporation Gas and Improvements Act, 1871, it was enacted that all the statutory and other rights, powers, privileges, and authorities by or under any act conferred or given to or vested in the company should apply to and be vested in the corporation, as if they had been originally named therein. And it was also enacted that the corporation might make, store, and *supply gas within the borough, and with- [169 in any place within the limits for the supply of gas by the company; and the corporation were also empowered to alter and extend the gasworks, and to do all such acts as they should think proper for making or storing gas, and for supplying gas within the limits. The bill alleged that, under the act of 1871, the corporation had purchased, and were then the owners of, the undertaking and works of the Bradford Gaslight Company; and that they were by the three acts empowered to supply and sell gas within the limits of the said acts, but not further or otherwise. It then stated that the corporation had within the last ten days taken measures for the supply of gas to buildings, manufactories, and houses beyond the limits of the said three acts, and within the limits within which the plaintiffs were authorized to supply and contract for the supply of gas; and a certain road in the township of Pudsey was mentioned, in which they were preparing to supply gas. It was then alleged, in paragraph 13 of the bill, that a certain manufacturer had lately

erected a large mill and premises wholly outside the corporation boundary and within the township of Pudsey, which the plaintiffs were ready, able, and willing to supply with gas, and which would have been supplied with gas by them but for the intervention of the corporation, who had entered into negotiations with the manufacturer in question for the supply of gas to the same mill and premises; and that the corporation were about to contract for the supply of gas to the same mill and premises, and intended to supply the same with gas accordingly. Paragraph 14 was as follows: "The said acts of the corporation are wholly unauthorized by the acts of parliament under which they derive authority to manufacture and supply or sell gas, and by which unauthorized acts the plaintiffs will be deprived of the profits arising from the sale of gas to the said manufacturer's houses and buildings illegally supplied or about to be supplied by the corporation, and great loss will be sustained by the plaintiffs if the said illegal acts of the corporation are permitted to continue." The bill prayed a [170] declaration that the corporation were not *entitled to supply gas outside their limits, and an injunction to restrain them from supplying gas within the limits of the Pudsey Gas Act, 1855.

Mr. Cotton, Q.C., and Mr. Cracknall, for the demurrer: The plaintiffs have no monopoly for the supply of gas to the township of Pudsey, and the defendants, or any other parties, have a perfect right to supply gas there if they can do so without creating a nuisance or finding it necessary to put in force their parliamentary powers. No act of parliament is required to enable persons to sell gas; and even when they have parliamentary powers extending over a district, they are not restricted to supplying gas within those limits: *Attorney General v. Sheffield Gas Consumers Company* ⁽¹⁾; *Attorney General v. Cambridge Consumers Gas Company* ⁽²⁾. Even in the metropolitan district, where there is a monopoly, it does not affect any parties except the companies amongst whom the monopoly is distributed: *Imperial Gaslight and Coke Company v. West London Junction Gas Company* ⁽³⁾. The Bradford Gas Company had consequently a clear right to sell gas in Pudsey, and it can hardly be said that the corporation, who have bought up the company, have less power.

Mr. Glasse, Q.C., and Mr. Freeling, for the plaintiffs: The equity of this bill is, that a municipal corporation cannot do anything beyond the district to which its powers are limited by the act under which it was constituted. And if in so acting it injuriously affects an individual, the party injured has a right

(1) 3 D. M. & G., 304.

(2) Law Rep., 4 Ch., 71; 6 Eq., 282.

(3) 14 W. R., 1019.

to apply to the court as an individual to stop the acts complained of, and it is not necessary that the suit should take the form of an information. Bearing this in mind, it is obvious that the cases cited on behalf of the defendants have nothing to do with the present case. The case which most resembles the present is *Stockport District Waterworks Company v. Corporation of Manchester* ⁽¹⁾, and the demurrer was only allowed then on the ground that no sufficient private injury was shown to allow the plaintiffs to maintain the *suit as individuals. Here a distinct in- [171] jury is alleged, and the case is an authority in support of the bill. The bill does not allege on behalf of the plaintiffs any exclusive right to sell gas in Pudsey. It simply restricts the corporation to the limits in which they have their powers.

Mr. Cotton, in reply: There is nothing in the nature of a municipal corporation which restricts its working to the municipal boundaries. As to the injury alleged, it is merely the competition of a rival trading company, which can hardly be sufficient. There was, in fact, an allegation of a similar injury in *Stockport District Waterworks Company v. Corporation of Manchester* ⁽¹⁾.

SIR R. MALINS, V.C. : This is a demurrer by the mayor, aldermen, and burgesses of the borough of Bradford to a bill filed against them by the Pudsey Coal Gas Company. The prayer of the bill asks for a declaration that the defendants, the corporation, are not entitled to supply gas to any street, building, or place which is not within the limits of their parliamentary boundary, and for an injunction to restrain them from supplying gas beyond those limits. It appears from the allegations of the bill that the township of Pudsey is immediately contiguous to the borough of Bradford, and that the corporation of Bradford have had transferred to them, under the authority of the Bradford Corporation Gas and Improvement Act, 1871, the rights of the Bradford Gaslight Company, which included compulsory powers to break up streets, and to lay down pipes, and to do other acts for the purpose of enabling them to supply gas to the town of Bradford and some adjoining districts. It appears that no part of the township of Pudsey was within the borough of Bradford, or within the limits to which the Bradford Gaslight Company's Acts applied. Under two other acts of parliament the plaintiffs had similar compulsory powers with respect to the township of Pudsey. By one of them, the Pudsey Gas Act, 1855, the limits were prescribed within which it might be put in *force, and the corporation had, under their [172] act, only the same powers as had previously belonged to the Bradford Gaslight Company. It is, therefore, perfectly clear

⁽¹⁾ 9 Jur. (N. S.), 266.

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that the parliamentary powers of the Bradford corporation were limited to the borough of Bradford and certain specified adjoining places, and those of the plaintiffs were limited to the township of Pudsey and certain other adjoining localities. The argument on the part of the plaintiffs is, that the Bradford corporation are a body existing for certain special purposes, and that beyond duties belonging to those purposes they have no right to do anything; and that, as regards the supply of gas, they have no right to go beyond their statutory limits. There is much to be said for this view. I am very much inclined to think that, on principle, I should have come to the same conclusion. But I think that the question has been already determined. I think it is quite clear that a gas company have no right to do anything which would amount to a nuisance, except where they have parliamentary powers; but there is nothing to prevent them supplying gas just as they like, if they can do so without causing any inconvenience. I consider, therefore, that *Attorney General v. Cambridge Consumers Gas Company* ⁽¹⁾, and the cases like it, have very little to do with the present question. But the case which has most bearing on the present case is *Stockport District Waterworks Company v. Corporation of Manchester* ⁽²⁾, and it seems to be entirely against the plaintiffs. The plaintiffs in that case were a company having power to take water from a particular river for the supply of a particular district, and the defendants, the corporation of Manchester, had allowed the other defendants, who were called the Stockport Waterworks Company, to effect a junction with their pipes, and so draw water for the supply of part of the plaintiffs' district. The plaintiffs then filed a bill against the corporation and the Stockport Waterworks Company for an injunction to restrain them supplying water in this way. A demurrer was filed and was allowed by the vice chancellor before whom the case came, and the case went on appeal before Lord Westbury, who laid down the rule that an incorporated company has only such powers as have been conferred upon it. But the demurrer having been filed, the question was *whether it was to be allowed or overruled. The vice chancellor had allowed the demurrer, and the lord chancellor, though he was of opinion that the corporation had no right to do what the bill alleged them to have done, considered that there was no allegation of private right which entitled the plaintiffs to maintain the suits. But in that case there was, in effect, the same allegation of private injury as in the present, because I find that the bill alleged that it was not within the powers of the corporation to furnish the water for the supply of Stockport and other towns, and that the

(1) Law Rep., 4 Ch., 71; 6 Eq., 282.

(2) 9 Jur., (N S.), 206.

just rights of the plaintiffs would be seriously prejudiced and injured. I am of opinion that the allegation in the 14th paragraph of the bill, that "great loss will be sustained by the plaintiffs if the said illegal acts of the corporation are permitted to continue," is not such an allegation of a private injury as this court will allow as the foundation for a bill. I am unable to see that this case can be distinguished from *Stockport District Waterworks Company v. Corporation of Manchester* (¹). I must, therefore, allow the demurrer.

Solicitors: Messrs. Torr, Jancway, Tugart, & Jancway; Mr. John Cann.

(¹) 9 Jur. (N. S.), 267.

[Law Reports, 15 Equity Cases, 175.]

V.C.M. Jan. 18, 1878.

*STEAD V. HARDAKER.

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[1870 S. 75.]

Payment of Testator's Debts — Specifically Devised and Descended Estates.

A testator gave all and every part of his real and personal property to his executors and trustees, to be disposed of by them according to the directions contained in his will. He directed his executors and trustees, as soon as possible after his death, to pay all his debts, funeral and testamentary expenses; he then gave all his personal estate to his brother absolutely, and he devised specifically various freehold estates, leaving other freehold estates undisposed of, which descended to his heir. The personal estate was insufficient for payment of his debts:

Held, that the specifically devised estates and the descended estates were liable ratably to the payment of debts.

THIS was a suit to administer the estate of Wm. Stead, who made his will on the 11th of February, 1865, in these terms: "I give to my executor and trustees hereinafter named, upon trust to their executors, administrators, heirs, and assigns, and the survivors or survivor of them, all and every part of my real and personal property, to be disposed of by them according to my directions contained in this my will. I will and direct that, as soon as possible after my death, my executors and trustees pay all my just debts and funeral and testamentary expenses. I give and bequeath all my personal property to my brother, Michael Stead, for his own separate use and purpose for ever." The testator then devised specifically various freehold estates to the different persons therein named, but made no residuary devise of his property. The testator died seized of or entitled to considerable real estate, both freehold and copyhold, other than that specifically devised by his will, and he died possessed of considerable personal estate. He died without issue, and

Michael Stead, his only brother, was his heir-at-law and customary heir. The personal estate of the testator was insufficient for payment of his debts and funeral expenses, and a question was now raised as to the order in which the devised and descended real estates were applicable to payment of the debts.

176] *Mr. Cotton, Q.C., and Mr. Everitt, for the heir-at-law : We contend, in this case, that the estates which descended to the heir-at-law and the specifically devised real estates must bear the testator's debts ratably between them. This was the decision in *Ryves v. Ryves* ⁽¹⁾. The same principle was laid down in *Fisher v. Fisher* ⁽²⁾, and was followed by *Wood v. Ordish* ⁽³⁾ and *Peacock v. Peacock* ⁽⁴⁾. The whole of the testator's real and personal estate is given upon trust, in the first place, for payment of debts, and consequently no part of the estates, either specifically devised or descended, can be exonerated from the payments of debts.

Mr. Harvey, for one of the executors, who was also a specific legatee : The cases which have been cited are cases of lapsed legacies, and are therefore of a different nature from this, where the real estates are undisposed of and descend to the heir-at-law. This is simply a devise charging the lands with the payment of debts, and then there are specifically devised estates. The testator must have known that he had not disposed of the beneficial interest in considerable freehold estate left on his death, and must have intended all the undisposed of real estate to bear the debts in exoneration of the specifically devised estates.

Mr. Millar, for the other specific legatees : This is not a devise in trust for the payment of debts, but only a charge of debts upon the estate, which must be subject to the general rule, that descended real estate shall be exhausted for the payment of debts before having recourse to specifically devised estates. The rule is laid down in *Manning v. Spooner* ⁽⁵⁾, where the master of the rolls said : "there are four classes of estates to be applied to the debts ; first, the general personal estate, unless expressly exempted ; secondly, any estate particularly devised for the purpose, and only for the purpose, of paying debts ; thirdly, estates descended ; fourthly, estates specifically 177] devised." This case followed **Davies v. Topp* ⁽⁶⁾. Under these rules the descended estates are liable to debts before the specifically devised estates. In *Row v. Row* ⁽⁷⁾ it was held that the costs of administering the estate must, as between the heir-at-law and the specific devisees, be borne primarily by the real estate descended.

⁽¹⁾ Law Rep., 11 Eq., 539.

⁽²⁾ 2 Keen, 610.

⁽³⁾ 3 Sm. & Giff., 125.

⁽⁴⁾ 34 L. J. (Ch.), 315.

⁽⁵⁾ 3 Ves., 114.

⁽⁶⁾ 1 Bro. C. C., 524.

⁽⁷⁾ Law Rep., 7 Eq., 414.

SIR R. MALINS, V.C.: There is no doubt whatever that the general principle is, that the descended real estate must bear the debts in priority to the specifically devised estate; but here the testator begins by giving all and every part of his real and personal property to be disposed of according to the directions contained in his will. Then, in the first place, he directs that as soon as possible after his death his executors and trustees shall pay all his just debts, funeral and testamentary expenses. If that is not a devise for the payment of debts, I do not know what is. It appears to me to be as clear a devise to pay debts in the first instance as I ever saw. Then, having fixed the payment of debts upon all his property, he proceeds to bequeath all his personal property to his brother, and he devises specific portions of his real estate to certain individuals, but he leaves undisposed of the remaining portion of his real estate. It is to be presumed the testator knew the effect of the law which gives the undisposed of real estate to his heir-at-law; but there is nothing to alter the fact that the whole estate is fixed with the burden of paying the debts, funeral and testamentary expenses. If nothing had been said about the payment of debts, then the case would have been different; but when he directs that all his estate shall be liable to payment of debts, you cannot say that part shall be exonerated, whether he has devised it specifically or allowed it to descend upon his heir. I decided in this way in the case of *Ryves v. Ryves* ⁽¹⁾, and in doing so I followed the former decisions in *Fisher v. Fisher* ⁽²⁾, *Wood v. Ordish* ⁽³⁾, and *Peacock v. Peacock* ⁽⁴⁾. In some of the cases cited the distinction was drawn between an estate devised upon trust for payment of debts, and a *devise subject to the payment of debts; but [178 in this case there is a distinct devise for payment of debts. It has been argued that there is a difference between a lapsed estate and an undisposed of estate, but it would be singular if it were held that the heir-at-law who takes an undisposed of estate which the testator must know will descend upon him, should be in a worse position than when he takes a lapsed legacy which the testator intended he never should take. I think, both upon principle and authority, that this heir-at-law must take the descended estates charged with a ratable proportion only of the debts. It appears to me that the rule that descended estates are liable for the payment of debts in priority to the specifically devised estates, is a very unreasonable rule, and that the court would be justified in not following it unless it was bound to do so. The order will be that the debts, funeral and testamentary expenses, and the costs occasioned by this suit, are to be all

⁽¹⁾ Law Rep., 11 Eq., 539.

⁽²⁾ 2 Keen, 610.

⁽³⁾ 3 Sm. & Giff., 125.

⁽⁴⁾ 34 L. J. (Ch.), 315.

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borne ratably by the property which is specifically devised, and that which goes to the heir-at-law.

Solicitor for the heir-at-law: Mr. J. W. Sykes.

Solicitors for the specific devisees: Messrs. Bell, Brodrick & Gray.

[Law Reports, 15 Equity Cases, 178.]

V.C.M. Jan. 14, 15, 1873.

BELL v. HOLTBY.

[1872 B. 325]

Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 32 — Protector of a Settlement — The Office survives.

A testator devised all his real estate to the use of his son George, for life, with remainder to his first and other sons successively, in tail male, and the testator appointed two persons, not including the tenant for life, to be protectors of the settlement under the 32d section of the Fines and Recoveries Act. There was no provision for filling up a vacancy in the office of protector. The tenant for life conveyed his life estate to his son, the plaintiff, who was the first tenant in tail. One of the protectors died, and the survivor joined with the tenant in tail in a disentailing deed; the estate was then sold to a purchaser for an estate in fee simple:

Held, that the estate tail was effectually barred by the surviving protector [179] *having joined in the disentailing deed and a demurrer to a bill for specific performance of the contract for sale was overruled:

Held, also, that where a doubt arises from the validity of a title, the decision of the court removes the doubt, and specific performance will be enforced.

RICHARD BELL, by his will, dated the 7th of July, 1849, after disposing of his personal estate, and bequeathing certain legacies, devised all the real estate which should belong to him at his decease to the use of his son Thomas Bell, for life, without impeachment of waste, with remainder to the use of John Varley the younger and Jordan Clarke, and their heirs, during the residue of the life of the said Thomas Bell, in trust to preserve contingent remainders, with remainder to the use of Thomas Bell's first and other sons successively, in tail male, with remainder to the use of the testator's son George Bell, for his life, without impeachment of waste, with remainder to the use of the said John Varley and Jordan Clarke during the residue of the life of the said George Bell, in trust to preserve contingent remainders, with remainder to the use of the said George Bell's first or other sons successively in tail male, with remainder to the use of the testator's grandson, Thomas Bell Wilson, in fee simple. The will then contained the following clause: "And in pursuance of the power and authority given by the Act of the 3 & 4 Will. 4, c. 74, entitled, 'an act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.' I hereby nominate and appoint

my friends J. Varley and J. Clarke to be protectors of the several estates, tail created by this my will, with such discretionary powers, authorities, and privileges, as are by the said act annexed to the office of protector."

Richard Bell, the testator, died in August, 1852. On the death of the testator, his second son, Thomas Bell, who was under the will first tenant for life, entered into possession of the estate devised thereby, and continued in possession thereof up to the time of his death, which took place on the 21st of February, 1868. He died without leaving issue him surviving. The testator's son, George Bell, was still living, and had issue four children, of whom the plaintiff was the eldest. *By a [180 deed dated the 10th of September, 1868, George Bell conveyed to the plaintiff all his life estate in the real property devised by Richard Bell's will. J. Varley, one of the trustees to preserve contingent remainders, and one of the protectors of the settlement appointed by the will, died, leaving J. Clarke his co-trustee and co-protector him surviving. J. Clarke, the survivor of the two protectors of the settlement nominated in Richard Bell's will, by indenture, dated the 14th of January, 1871, joined the plaintiff in a disentailing assurance of the freehold hereditaments. The plaintiff had previously aliened the hereditaments so as to create a base fee. By a deed poll, dated the 14th of January, 1871, under the hand and seal of the said J. Clarke duly perfected, J. Clarke consented to the plaintiff aliening the copyhold part of the estate, and by a surrender duly made, founded thereon, the copyhold part of the estate was expressed to be surrendered by the plaintiff to the use of the plaintiff, his heirs, and assigns. By a contract in writing dated the 9th of May, 1872, the plaintiff agreed to sell and the defendant agreed to become the purchaser of the freehold and copyhold estate comprised in the will of Richard Bell, for an estate of inheritance in fee simple in possession, for the sum of £14,500. The defendant objected that J. Clarke was not at the time of the assurances of the 14th of January, 1872, the protector of the settlement made by the will, and therefore that the said assurances were not effectual to enlarge the base fee in the freehold hereditaments and to bar the estate tail in the copyhold hereditaments. The plaintiff contended that the objection was without foundation, and that he could make a good title to the estate. The bill prayed that the purchaser's objection might be declared to be unfounded, and that the contract might be specifically performed under the direction of the court.

Mr. Pearson, Q.C., and Mr. W. Pearson, for the demurrer: The only question in this case is, whether the office of protector of a settlement survives in case of the death of one of the protectors

appointed by the testator. Mr. Bell though fit by his will to [181] *appoint two persons to be protectors, and one of them having died the survivor joined the tenant in tail in a disentailing assurance, and afterwards a contract for sale was executed by the tenant in tail. If the office of protector survives then the purchaser would have a good title, but if not the demurrer must be allowed.

This question has never yet arisen in any case for adjudication, nor has it ever been discussed by any of the writers of text books. The only allusion to the point which can be found is in the case of *Bankes v. Le Despencer* ⁽¹⁾, which was a suit for the purpose of giving effect to the directions of a settlor as to the settlement of certain estates, and there the vice chancellor of England made this observation in reference to the Fines and Recoveries Act (3 & 4 Will. 4, c. 74): "The act of parliament itself furnishes reasons why a protector should not be appointed by the court unless upon a special case. By the 36th section a protector is made irresponsible, and is at liberty to act from mere caprice, ill will, or any bad motive. By the 37th section a protector is enabled to take a bribe for giving consent; and if two or three persons are made protector, and any one of them incurs a disability under the 33d section, then it is questionable at least whether this court could act in lieu of such person with the other or others who are not disabled; and if it could not, there would be no protector capable of acting." Lord St. Leonards, in his book upon Powers ⁽²⁾, refers to these observations in the case of *Bankes v. Le Despencer*, but does not discuss the question of survivorship. Arguing by analogy, the case of *Alwaters v. Birt* ⁽³⁾ would be an authority in support of our view, for there, in a feoffment to uses, with a proviso that on payment of 12*d.* and procuring the assent of the feoffees the uses should cease, it was held that this gave them an authority, and that if one of them died performance to the surviving feoffees was not a revocation. The act gives the settlor power to direct that the office of protector shall be filled up and perpetuated in case of the death of any of the protectors, but no such power is inserted in this will; and this shows that the intention of the act was that if no such power were contained in the settlement the office should not survive. The case of *In re Wainwright* ⁽⁴⁾ is [182] also an *authority in support of this view. The act itself shows what the intention was, since it enables the settlor to appoint persons to be the protector — not protectors, in the plural. This is similar to a power to two or more persons to sell or do any other act. In such cases it is settled that the power must

⁽¹⁾ 11 Sim., 508, 527.

⁽²⁾ 6th Ed., p. 128

⁽³⁾ Cro. Eliz., 856.

⁽⁴⁾ 1 Ph., 258.

be exercised by the whole of the persons named or it cannot be exercised at all. Lord St. Leonards, in his Treatise on Powers, says ⁽¹⁾, "It is regularly true at common law that a naked authority given to several cannot survive. Therefore, if a man devise his lands to A for life, and that after his decease the estate shall be sold by the executors, naming them, as by B and C his executors, or by B and C who are not named executors, in that case, if one of them die during the life of A the other cannot sell, because the words of the testator would not be satisfied." Then he says that power is given to the executors generally may be exercised by the survivors, and he sums up the law in these terms ⁽²⁾: "1. That where a power is given to two or more by their proper names who are not made executors it will not survive without express words. 2. That where it is given to three or more generally, as to 'my trustees,' my sons, &c., and not by their proper names, the authority will survive whilst the plural number remains. 3. That where the authority is given to executors, and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it. But, 4. That where the authority is given to the *nomination*, although in the character of executors, yet it is at least doubtful whether it will survive. But where the power to executors to sell arises by implication the power will equally arise to the survivor."

But, apart from the nature of the office of protector, if we look at the statute itself it is clear that it never was the intention that the office should survive, and the latter part of sect. 32 makes the matter clear by providing that in case the persons appointed protector should cease to be so, and no other person shall have been appointed in their place, then the natural protector, that is, the person who would have been protector except for that clause, shall be the protector. This provides for the case we have here, and shows that the office does not survive. A settlor may well be *supposed to have confidence in three persons, or in two, when he would not in the survivors or survivor. But suppose the court should be of opinion that there could be a survivorship, still the question is not so clear that a title of this nature can be forced upon a purchaser. A purchaser cannot be compelled to take a doubtful title upon a bill for specific performance. This is laid down in Dart's Vendors and Purchasers ⁽³⁾, where all the authorities are cited, and particularly the two cases, *Pyrke v. Waddingham* ⁽⁴⁾ and *Rogers v. Waterhouse* ⁽⁵⁾. In the former case it was laid down

⁽¹⁾ 7th Ed., p. 143.

⁽²⁾ Page 146.

⁽³⁾ 4th Ed., pp. 1009-1013.

⁽⁴⁾ 10 Hare, 1.

⁽⁵⁾ 4 Drew., 329.

that a doubtful title, which a purchaser would not be compelled to accept, was not only a title upon which the court entertained doubts, but included also a title which, although the court had a favorable opinion of it, yet might reasonably and fairly be questioned in the opinion of other competent persons; for the court had no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its opinion in favor of the title should turn out not to be well founded; and in *Rogers v. Waterhouse* it was said that although the court might entertain a strong opinion in favor of the title of a party, that was not sufficient in a suit for specific performance. To force a title on a purchaser, the opinion of the court must be so clear that it did not apprehend that another judge would form a different opinion; and in *Collier v. McBean* ⁽¹⁾, although the two lords justices considered the title good, yet, as the master of the rolls had decided it was not good, the Court of Appeal would not force the title upon a purchaser. Lord Justice Turner said: "The purchaser is entitled to require a marketable title, and the judge whose decision is appealed from having pronounced the title bad, I think we ought not to force it upon the purchaser unless we can come to the conclusion that his opinion is clearly erroneous." Under these circumstances, therefore, the court will not force a title upon a purchaser when there is so much doubt arising.

Mr. Glasse, Q.C., and Mr. Charles Hall, in support of the bill: In answer to the last argument which has been raised, that the [184] *court will not force a doubtful title upon a purchaser, we may cite the case of *Beioley v. Carter* ⁽²⁾ to show that the court is bound to decide the question of title in a suit for specific performance. That case came on upon appeal from the master of the rolls, who had decided against the validity of the title. The lords justices said that, notwithstanding the great weight due to the opinion of the master of the rolls, and notwithstanding the observations in *Collier v. McBean* ⁽¹⁾, they considered it was the duty of the Court of Appeal to form an opinion upon the question of title and to act upon it, as Lord St. Leonards had done in the case of *Sheppard v. Doolan* ⁽³⁾. They then decided, contrary to the opinion of the master of the rolls, that the title was good, and decreed specific performance. The same principle was acted upon in *Bull v. Hutchens* ⁽⁴⁾; *Alexander v. Mills* ⁽⁵⁾; *Radford v. Willis* ⁽⁶⁾. Upon the principal question the case of *Houell v. Barnes* ⁽⁷⁾ is an answer to the case of *At-*

⁽¹⁾ Law Rep., 1 Ch., 81.

⁽²⁾ Law Rep., 4 Ch., 230.

⁽³⁾ 3 D. & War., 1, 8.

⁽⁴⁾ 32 Beav., 615.

⁽⁵⁾ Law Rep., 6 Ch., 124..

⁽⁶⁾ Law Rep., 7 Ch. 7.

⁽⁷⁾ Cro. Car., 382.

waters v. Birt ⁽¹⁾, for there it was held that a power of sale given to executors might be executed by a surviving executor where the power was not coupled with any interest. The office of protector is of a similar character, and on the death of one protector the office survives. In the case of *Brassey v. Chalmers* ⁽²⁾, where a testator devised land subject to payment of debts to A, and B, their heirs and assigns, and authorized his executors, thereinafter mentioned, with the approbation of his trustees for the time being, to sell any part of his estate; it was held that the surviving executor, with the assent of trustees appointed by the Court of Chancery, in whom the devised lands were vested by a vesting order, could make a good title; and in *Keer v. Brown* ⁽³⁾, where, by an instrument executed before the Fines and Recoveries Act, real property was settled to the use of a married woman for life, with remainder over in tail, she was declared to be the sole protector of the settlement, and her husband's consent was not requisite to enable the *tenant in tail to make an absolute [185 disposition of the property. Lord St. Leonards, in his treatise on the New Statutes ⁽⁴⁾, in commenting upon the case of *Bankes v. Le Despencer* ⁽⁵⁾, adds this observation: "This would not, it seems, affect the right of the trustees as protectors. Whether their right would be affected by a subsequent merger remains to be decided." Mr. Hayes, in his book on Conveyancing ⁽⁶⁾, alludes to this subject, but does not discuss the point now before the court.

It has been argued that the latter part of the 32d section of the act shows the intention of the legislature to have been that the office of protector should not survive; but it may with some justice be said that it shows just the reverse. The words are, "Provided nevertheless, that the person who, but for this clause, would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause if the settlor shall think fit; and shall, unless otherwise directed by the settlor, act as sole protector if the other persons constituting the protector shall have ceased to be so by death, or relinquishment of the office by deed, and no other person shall have been appointed in their place." Now suppose two other persons were appointed with the natural protector, this clause shows an intention that the natural protector shall not act alone until both the others have ceased to act, inasmuch as otherwise the object of the settlor would be defeated by the death or retirement of one only of the persons appointed. It was in consequence of the intention that he should not act alone that these

⁽¹⁾ Cro. Eliz., 856.

⁽²⁾ 4 D. M. & G., 528.

⁽³⁾ Joh., 188.

⁽⁴⁾ Page 205.

⁽⁵⁾ 11 Sim., 508.

⁽⁶⁾ 5th Ed., p. 166.

words were introduced. The nearest case to that of a protector of a settlement is the office of a guardian, and when it is provided that a legacy shall be paid upon marriage with the consent of A, B, and C, the consent of the survivors or survivor would be sufficient in case of the death of either or both of the others. That was decided in *Eyre v. Countess of Shaftesbury* ⁽¹⁾. This is not like the case of a power to sell given to trustees *nominatim*, where upon the death of one the power cannot be exercised; but it is like the power attaching to the office of executors, which [186] may be exercised by the surviving executor. *That was the reason for the decision in *Atwaters v. Birt* ⁽²⁾, where the power was given to be exercised by four distinct persons who were named; of course that was a power which could not be exercised if either of those persons died. The protector of a settlement is an office created by act of parliament, and as long as there are any persons in the office the power survives. The office is created by way of substitution for the former state of things; the persons forming the protectorate are to take the position of the tenant for life. By the 22d section of the act the owner of the prior life estate is to be deemed the protector; the protector therefore, is to be treated as the owner of the prior estate. The object of this settlor was to take the control out of the hands of the tenant for life; but if the office does not survive, then immediately on the death of one protector the tenant for life would have the control, notwithstanding the settlor's intention to the contrary. Suppose there had been a power in the settlement to perpetuate the office, that power would be, in case of the death of one or two, to appoint others in their place; and it could never have been the intentio at the office should entirely cease until the new protectors had been appointed, for then the tenant for life would become the protector for the time being upon the occurrence of every vacancy, and might join with his son in executing a disentailing deed before the office of protector could be filled up. The act provides that the newly appointed protector shall act along with any surviving protector, clearly showing the intention that the office should survive. The tenant for life is not to be the protector unless he is the sole survivor after the death of those appointed. The act virtually says that if the tenant for life is appointed a protector jointly with two others, and one other should survive, then the two jointly are protectors. When one dies you are to fill up the vacancy; that is, to appoint one more, to be added to the other two; and not to appoint three, as would be the case if the office expired every time one died.

Mr. Pearson, in reply: The distinction between this case and

(¹) 2 P. Wms., 108.

(²) Cro. Eliz., 856.

that of a guardian is that *the guardian has an interest [187 coupled with an authority. Every guardian in that case is a complete guardian.

Mr. *Glasse*: These protectors have an interest, for they are appointed trustees to preserve contingent remainders.

Mr. *Pearson* cited *Sykes v. Sheard* ⁽¹⁾ to show that a doubtful title could not be forced upon a purchaser.

SIR R. MALINS, V.C.: This case, in which I have had every assistance I could have had from the bar, is one in which I should have reserved my judgment if I had not, last night, had an opportunity of reading every authority which was cited yesterday, and no other authority of any importance has been cited to-day. Indeed, I may say it is a question on which no authority is to be found, for the result of my reading several hours last night was, that I came to the conclusion that there is nothing in the books having the slightest direct bearing on the subject. The question which has been so elaborately argued before me is whether, when a settlor, instead of leaving the tenant for life to be, as he ordinarily would be, protector of the settlement, avails himself of the power conferred on him by the 32d section of the Fines and Recoveries Act, and appoints other persons protectors, they are in office only during their joint lives, or whether the office survives. If the office survives, then the concurrence of Mr. Clarke in this disentailing deed was effectual and the estate tail was completely barred, and under the disentailing deed the purchaser will acquire a good title. If, on the other hand, the office did not survive, then the concurrence of Mr. Clarke is ineffectual, and a good title cannot in that case be made. The tenant for life has not concurred; he has been convicted of felony, and the great seal has been substituted for the tenant for life. The question therefore is, does the office, or does it not, survive?

It is very singular that although this act of parliament has been in operation close upon forty years this point seems never to have arisen; for various text books have been referred to. Lord St. *Leonards, Mr. Hayes on Conveyancing, and [188 all the books written on the subject, have been accessible, but it is not suggested that any writer has either discussed the question or made any suggestion on the subject. The case, therefore, is left perfectly open. Sir Lancelot Shadwell, in the case of *Bankes v. Le Despencer* ⁽²⁾, went very fully into the question whether protectors should be appointed or not. It was argued that the protector should be appointed instead of leaving the protectorship to the tenant for life. He came to the conclusion that there were various opinions as to the office

⁽¹⁾ 2 D. J. & S., 6.

⁽²⁾ 11 Sim., 506.

of protector, but he did not say a word, nor was he called upon to say a word, as to whether the office was one which continued only during the joint lives of the persons appointed, or whether it survived. The point, therefore, is left perfectly open by him, as it is by everyone else. The case has been argued chiefly by analogy to other cases, and perhaps it may be said with correctness that there are only two or three cases that have the slightest application to this case. First, it is said on the part of the plaintiff that this is regulated by the case of *Houell v. Barnes* ⁽¹⁾. Mr. Pearson and his junior, Mr. William Pearson, rely upon *Atwaters v. Birt* ⁽²⁾. *Atwaters v. Birt* was a case where there was a settlement of an estate, with a power of revocation if a tender was made to four persons named. One of them died, and the decision was that the tender to the survivors was ineffectual. In other words, the decision was that a mere naked power like that, given to persons *nominatim*, does not survive. In opposition to that Mr. Glasse relied upon *Houell v. Barnes*, where a mere power of sale being given to executors it was held that it did survive, and that the surviving executor could effectually exercise that power. The question there was, whether it was annexed to the office or whether it was an individual power. I am inclined to think I must reject *Houell v. Barnes* as well as *Atwaters v. Birt*. *Houell v. Barnes* decided that the power was annexed to the office and not to the individuals, because the law is clear, that if a man authorizes executors to sell, the surviving executors can most unquestionably sell; but if he authorizes A, B and C to sell, without saying anything about survivors, it being a mere naked power, then, I believe, the law is clear that if one dies the two survivors cannot make a title, but other means must be resorted to for the purpose. If, therefore, this were a mere naked power, probably it would be decided upon the principle of *Atwaters v. Birt* ⁽²⁾. But it is not a mere naked power; it is not an interest; it is something *per se*; it is not like anything else. It is an office created by act of parliament, and in order to see what the office is one must look at the act of parliament to see what the intention of the legislature was. This act was framed by one of the most eminent real property lawyers of his day, and one of the most skillful draftsmen of the age, and therefore one must look at it with the greatest possible respect; and such a doubt as this having arisen upon an act on this subject, prepared by a man so skillful as Mr. Brodie, shows what difficulties there always must be, whether it be in a general code or in a code on a particular branch of the law, as this act is, in foreseeing all the difficulties that will arise, and *d priori* providing for the infinite

⁽¹⁾ Cro. Car., 382.

⁽²⁾ Cro. Eliz., 856.

variety of transactions which no human sagacity can foresee. This is an office created by act of parliament, and in order to arrive at a conclusion on this important subject, you must see what the position of affairs was and what was the object of the legislature in making these provisions.

Those who are old enough to remember the period when fines and recoveries existed — and there is some advantage even in being old enough for that — would know that no effectual recovery could be made without the concurrence of the freeholder. Now this act of parliament introduces several new things. Before this act — and it was a very common thing — when parties wanted to tie up property as long as they could, a settlor, instead of giving his son a tenancy for life, gave a tenancy for ninety-nine years if the tenant for life should so long live. Therefore an estate might be settled to A for ninety-nine years, if he should so long live, with remainder to his first and other sons in tail, and so forth. The tenant for life was not in that case a consenting party, and it was not necessary for him to concur in the recovery. This act makes both a tenant for years determinable on a life, and a tenant for life a protector, when there is no other appointed. It *makes the tenant [190 for life in the ordinary sense protector, but it adds the extraordinary power given by the 32d section, the wisdom of which I am unable to see, to enable a settlor to take the power of barring the estate out of the control of tenant for life and his son, and put the control in the hands of different persons. The 32d section enacts that the settlor may provide and appoint any number of persons, not exceeding three, to be protector of the settlement, and it provides that in case of vacancies in the office the vacancies may be supplied. This testator, availing himself of this power, appointed these two gentlemen as protector of the settlement. If this is to be regarded as a mere naked power, then I say the case of *Atwaters v. Birt* ⁽¹⁾ applies, and the office does not survive. If it is a power like that of an executor attached to the office, then the case of *Houell v. Barnes* ⁽²⁾ applies, and the office survives. My opinion is, it is neither one nor the other, and that neither of the two cases regulates the decision I ought to come to. What, then, is it? Now, in order to test it you must look at the consequences. If the office does not survive, this testator, having appointed two persons protector, it is clear that directly the office of protector ceases the protectorship falls back on the tenant for life. In this case, after the death of Thomas, the testator's son, George Bell, became tenant for life in possession, with remainder to his first son in

(1) Cro. Eliz., 856.

(2) Cro. Car., 883.

tail male, and if there is no protector, George Bell, as tenant for life, is the protector. Now there might have been three persons appointed, and if Mr. Pearson's argument is right the death of one would cause a total cessation of the protectorship, for there is no power of appointing a successor under this will, and therefore the death of any one of the three would have caused a cessation of the office of protector, and there being no other protector, it would at once fall back into the hands of George Bell, the tenant for life. Is it more consistent with the intention of the testator — is it more consistent with the intention of the legislature — that the office, to which no interest is attached, should be regarded as one continuing to the survivor or survivors? or is it a joint office, by which the office of all would come to an end as soon as one died, and the control would [191] fall back into the hands of the tenant for life? *There would be so many inconveniences if that were so, that I cannot think it was the intention of the legislature. The legislature having armed the testator or settlor, as the case may be, with this power, it would be very inconsistent that directly one died the power should go into the very hands that the settlor had shown an anxiety that it should not go into, because if he had wanted his own son appointed protector, why appoint a protector at all? He puts on the grandson the necessity, not of appealing to his own father, but to contend with an arbitrary power vested in the hands of indifferent persons, who would not be inclined so readily as the father might be to bar the estate, which the testator has shown an anxiety should be preserved longer than if the protectorship had been left in the hands of his own children as tenants for life. Therefore, in point of convenience, it seems to me that the construction is much more in favor of its being a joint tenancy, that is, not an office during the continuance of the joint lives, but an office continuing while the persons originally named, or any one of them, are or is alive, and only coming to an end when all are dead.

I also think that this view is considerably favored by the words at the end of the section, "Provided further nevertheless, that the person who, but for this clause, would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause" (it was not so in this case), "if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by the death or relinquishment of the office by deed;" "if the other persons," not the other person, but "the other persons," showing, therefore, that if the tenant for life be one, and there be two other persons, he is not to become protector again when

one of them dies, but when the other persons so appointed ceased to have any power by death. I think that shows that if two be associated they must both be dead before it falls back on the tenant for life, and therefore, on that ground, it seems to me that every rule of construction is in favor of holding that this is an office to which survivorship is attached. It is quite true (and I agree with all that Mr. Pearson said on the subject) that the grant of a mere *office, as in the case referred [192 to in the 11th Coke ⁽¹⁾, *Jones v. Beau* ⁽²⁾, to two persons does not mean that the office is to survive unless so granted. I have already said that a mere naked power of sale to several persons is an authority to them while they are all alive, and it ceases when one dies; but this is a peculiar office. I think the words, "to the person or the survivor," were not inserted because it was the intention of the legislature that it was to be an office to continue while any one was alive. I think every rule of convenience is that it should not be taken out of the hands of the persons appointed while those persons, or any one of them, continue to exist. That is my view of the section. I have given a great deal of consideration to it, and that is the conclusion to which I have come. I do not think the analogy between a mere naked office and one in which there is an interest would apply; but you must look at the intention of the legislature and the various views taken, and upon that I form my opinion. Perhaps the most direct analogy is the case of testamentary guardians. If a man appoint two person guardians of his children, by that, he says, I commit the care of my children, their fortune, their education, and everything that is dear to them, to A and B, but he does not necessarily mean to give it to A and B alone. It has been settled by the case of *Eyre v. Countess of Shaftesbury* ⁽³⁾ that the office of testamentary guardian does survive, and therefore, although a man appoints his wife and two friends guardians of his children, the survivor of the three is a complete guardian, and has all the authority which the three had when they were alive. That is so as to guardian of the person. Therefore I take it the case of a guardian is the nearest analogy there is. Two persons being appointed guardians, the survivor becomes guardian of the person, to protect every interest attached to that office. I do not see any interest arising to prevent the survivor of two persons who are appointed protector of the estate from being the protector as well as the two. That is, therefore, the conclusion at which I arrive.

There is one other point I ought not to pass over. It has been *urged upon me that if there is any doubt about it, this is [193 not a title which should be forced upon the purchaser. I am happy

⁽¹⁾ Page 15.⁽²⁾ 4 Mod., 16.⁽³⁾ 2 P. Wms., 103.

to find that, quite in accordance with my own opinion, that notion about doubtful titles not being forced upon purchasers has disappeared in modern decisions. I entirely and most heartily concur in the judgment of the Lords Justices Selwyn and Giffard, in the case of *Beioley v. Carter* ⁽¹⁾, in which, although the master of the rolls thought there was a doubt whether a sale could take place under the leases and Sales of Settled Estates Act, because the consent of unborn persons could not be obtained, although the master of the rolls thought a title could not be made, and the very circumstance of his thinking so created a doubt, the lords justices, having a contrary opinion, would not allow it to be the ground of a doubt, because it was the duty of the court to remove such doubts. That has been followed by the cases of *Bull v. Hutchens* ⁽²⁾ and *Radford v. Willis* ⁽³⁾. I think, therefore, it may be considered as settled that where doubtful cases of construction arise, whether on an act of parliament or the words of an instrument or will, it is the duty of this court to remove that doubt by deciding it; and instead of feeling a doubt whether other judges at other times may think in the same way with them, I consider it is the duty of the court to assume that that which a competent tribunal has at one time decided will be followed at future times, and that that which judges of the present time think right it is to be assumed judges of equal competency in the future will think right also. This is a peculiar case, and if there be any doubt on the subject, it is the duty of the court to remove it. If it is a question of construction on an act of parliament, the question of construction must be decided by the court, and when a doubt is raised on an act of parliament the court removes the doubt by deciding one way or the other; and when it is once decided it cannot be taken to be a doubtful point any longer. I do not feel any doubt on this subject, and I come to the conclusion that the office is one which did survive; the consequence of which is, that Mr. Jordan Clarke, as surviving protector appointed, was the protector of the settlement; and the disentailing deed having been executed by the 194] tenant in *tail with his concurrence, there is an effectual bar of the estate tail, and a good title can be given to the purchaser. The consequence is, I must overrule the demurrer.

I think it would be better to preface the decree with the words, "The court being of opinion that Jordan Clarke, having survived the other protector, J. Varley, was the protector of the settlement." Then it follows that the estate tail was barred with his concurrence, and that a good title can be made. I say nothing about costs, as I understand they have been provided for. The case has been raised in a most proper manner by de-

⁽¹⁾ Law Rep., 4 Ch., 230.

⁽²⁾ 32 Beav., 615. ⁽³⁾ Law Rep., 7 Ch., 7.

murrer to a bill of three pages. The demurrer, therefore, is simply overruled.

Solicitors for the plaintiff: Messrs. *Gregory, Rowcliffes & Rawle*.

Solicitors for the defendant: Messrs. *Sharpe & Ullithorne*.

[Law Reports, 15 Equity Cases, 200.]

V.C.B. Jan. 11, 1873.

*SOBEY v. SOBEY.

[200

[1870 S. 285.]

Practice — Ne Exeat.

Upon evidence that a defendant, who has been ordered by decree in an administration suit to pay into court on or before a certain day the balance admitted by his answer to be due from him to the estate, is about to leave the country, a writ of *ne exeat* may be obtained against him by his co-defendants, the executors, although the day to which the time for payment was extended has not arrived.

THIS was a motion on behalf of the defendant, W. T. Sobey, that a writ of *ne exeat* issued against him on the 14th of December, 1872, under which he had been arrested and lodged in Lancaster jail, might be discharged with costs and damages to be certified and paid by the defendants John Sobey and Thomas Olver, who had applied for and obtained the writ. The suit was for administration of the estate of Thomas Sobey, the testator, of whom the defendants John Sobey and Thomas Olver were executors. By the decree made on the 4th of December, 1872, it was ordered that the defendant W. T. Sobey, who had been in receipt of the rents of testator's real estate and had had the control of portions of his personal estate, should, on or before the 1st day in Hilary Term, 1873, pay into the bank, to the credit of the cause, the sum of £600 (admitted by his answer to be the balance due from him to the estate.) On the 14th of December, 1872, the defendants John Sobey and Thomas Olver moved *ex parte* for a writ of *ne exeat* against W. T. Sobey, and the application was supported by the affidavit of Mr. Hingston, their solicitor, stating that Sobey, who was a solicitor, after selling his furniture and property, and giving a power of attorney, was seen to leave Plymouth station on the 12th of December, 1872, for Liverpool. "He said he was going to see his son off for America: he would not say that he was not going himself." He had his luggage with him, and informed deponent that he had with him in his portmanteau his books, diaries, and papers relating to the suit.

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Sobey v. Sobey.

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201] *In support of the application *Done's Case* (1) was cited as an authority that in matters of account, where money was sworn to be due, one defendant might obtain the writ against a co-defendant without filing a bill; and *Whitehouse v. Part-ridge* (2) was referred to upon the question whether the writ might be granted before the day fixed for payment when the court was satisfied that the party was going abroad to evade payment.

The vice chancellor made the order upon the usual undertaking. The defendant W. T. Sobey now moved to discharge the order, and, in support of the motion, had filed an affidavit stating that he was compelled, through a severe domestic affliction, to break up his establishment at Lostwithiel, but did not sell all his furniture and effects in so doing, but the most bulky portion only, and that this was more than twelve months since; that the plaintiff, E. G. Sobey (his younger brother), knew where he was going and for what purpose, had his address, and forwarded letters to him at Liverpool. Referring to the meeting with the defendants' solicitor at Plymouth Station, W. T. Sobey stated that he did not say he was going to see his son off to America, but that he was going to see him off to sea. When asked if he were himself going abroad, he replied, "Certainly not," and to the best of his knowledge and belief the word America was not mentioned; and on leaving he gave Hingston his Liverpool address, at which he was arrested four days afterwards. He also stated: "I had not nor have the slightest intention of leaving England and taking up my permanent abode anywhere abroad, nor had I made any preparation for so doing, and I left my correct address with the plaintiffs and the solicitor of my co-defendants." Evidence was given in opposition to the application, confirming and amplifying the statements upon which the writ had been obtained. Since his arrest and confinement in Lancaster jail, a deed giving the defendants a security for the balance due from him had been forwarded to W. T. Sobey for his execution.

Mr. *Eddis*, Q.C., and Mr. *Badnall*, in support of the motion: First: The evidence now adduced clearly shows that the defendant, W. T. Sobey, had no intention, as alleged, of leaving the country or of evading the order of the court for payment of the money; and in any case, as he is ready to execute a security for the amount, he cannot be detained in custody any longer. Secondly: Even assuming that the evidence of intention to leave the country was sufficient, the writ was irregularly issued. Until the day fixed for payment (the 11th of January, 1873) the money was not actually due, and the writ

(1) 1 P. Wms, 263.

(2) 3 Sw., 365, 375.

of *ne exeat*, which is in the nature of equitable bail, can only be issued on an equitable debt then due and payable, and where if it was at law bail could be had, and this rule has been held to apply even where the obligor, upon a bond payable on the 1st of January, by agreement obtained indulgence until the 1st of July, and in the last week in June declared his intention of leaving the kingdom to evade payment: *Dawson v. Dawson* ⁽¹⁾; *Whitehouse v. Partridge* ⁽²⁾; *Haffey v. Haffey* ⁽³⁾.

Mr. Kay, Q. C., and Mr. Bevir, *contrd*: We say it is clear that W. T. Sobey intended to leave the country to evade compliance with the order of the court. The debt to the estate was admitted by his answer, and was actually due from him before the order was made for payment of the amount on or before the 11th of January, 1873. The mere fact that time was given for payment by way of indulgence cannot enable the defendant to escape from the terms of the order. "If the court, having granted time for payment of money, is satisfied before the time arrives that the party is going abroad to prevent payment of the money, it will undoubtedly interpose:" per Lord Eldon, *Whitehouse v. Partridge* ⁽⁴⁾. In the cases cited the cause of action had not arisen, but here the debt was admitted by the defendant's own answer to be then due and owing, and the effect of the decree was only to allow time for payment, so that the *dicta* do not apply.

Mr. Eddis, in reply: Before the day fixed for payment the executors could not have claimed the money, and therefore [203] were not entitled to apply for the writ.

SIR JAMES BACON, V.C.: There is no doubt in this case, either upon the law or the facts. The decree of this court for payment of a sum of money is equivalent to a judgment at common law, and will be enforced, if necessary, by a writ of *ne exeat regno*. The case of *Whitehouse v. Partridge* ⁽²⁾ is no authority against granting the writ, but rather in favor of it. Lord Eldon there says: "If the court, having granted time for payment of money, is satisfied before the time arrives that the party is going abroad to prevent payment of the money, it will undoubtedly interpose." In the case referred to by Lord Eldon, which seems to have much impressed him, as he frequently refers to it, the creditor having given time to his debtor from the 1st of January to the 1st of July, the debtor during the last week in June thought proper to attempt to leave the kingdom, and on great consideration the court decided that it could not grant the writ. But in that case no cause of action had arisen until the time fixed for payment had expired, and the debtor could not have been

⁽¹⁾ 7 Ves., 173.

⁽²⁾ 3 Sw., 365, 377.

⁽³⁾ 14 Ves., 261.

⁽⁴⁾ 3 Sw., 375.

held to bail at common law. The practice at common law was entirely different, for formerly the plaintiff, if he chose to issue the writ, could hold the defendant to bail, whether there was any attempt to escape or not; and now, by the recent act for the Abolition of Imprisonment for Debt (32 & 33 Vict. c. 62), s. 6, it is provided, that where the plaintiff in any action—in which, if brought before the commencement of the act, defendant would have been liable to arrest—proves that he (plaintiff) has good cause of action to the amount of £50, and that there is probable cause for believing that defendant is about to quit England, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, the judge may order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security.” Here there was an order of the court for payment upon the admissions of 204] the defendant contained in his answer, and the *extension of time for payment until the 11th of January, 1873, could not alter his liability to pay, or do away with the effect of that which was in the nature of a judgment against him for the amount. The only remaining question is, whether the court is satisfied that the defendant intended to leave the country for the purpose of defeating this order. Upon the evidence [to which his honor referred] I should be wrong if I expressed the slightest hesitation or doubt as to the intention to leave the country. That being so, the writ was, in my opinion, properly issued; and the other defendants had a right to prevent W. T. Sobey from leaving the country. As, however, it has been proposed that he shall execute a security for payment of this money, he will be discharged upon executing the security.

MINUTE OF ORDER: Upon executing the assignment and undertaking to make an affidavit as to all deeds, &c., in his possession, &c., relating to testator's estate, and to deposit the same with his agents, let defendant W. T. Sobey be discharged from custody. Defendant W. T. Sobey to pay to defendants John Sobey and Thomas Olver their costs of the writ of *ne exeat* and of this application.

Solicitors: Messrs. *Sole, Turner & Turner*; Messrs. *Coode, Kingdon & Cotton*.

[Law Reports, 15 Equity Cases, 204.]

V.C.B., Dec. 13, 14, 1872. Jan. 14, 1873.

LEE v. SANKEY.

[1871 L. 8.]

Breach of Trust—Solicitor dealing with Trust Estate—Payment to one Trustee—Discharge.

A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate, which had been taken by a railway com-

pany, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid.

Held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust estate from such improper payment.

THIS was a bill by Grace Lee (since deceased), widow and surviving trustee of the will of the testator, John Lee, and by her *children beneficially interested thereunder, against [205 the defendants, a firm of solicitors, for the purpose of rendering them accountable in respect of the trust moneys which had come to their hands with notice of the trust, and had been lost by the insolvency of the co-trustee, to whom the fund had been handed over by the defendants.

John Lee, by his will, dated the 19th of August, 1847, gave all his real and personal estate to his wife, Grace Lee, and his brother-in-law, John Ginder, upon trust to call in and convert into money all his personal estate, and to sell and dispose of his real estates, and to receive the moneys arising from such sale, and give effectual discharges for the same, and stand possessed thereof, upon trust to permit his wife to receive the income during his life or widowhood, with a direction for her thereout to maintain his children during their minorities; and from and after the death or second marriage of his wife, upon trust for all his children in equal shares. Power was given to the trustees to appropriate, without prejudice to subsisting trusts, all or a competent part of the prospective shares of the children for their advancement; and the testator appointed Sarah Lee and John Ginder executors and trustees of his will. John Lee died in June, 1853, leaving his widow and seven children, and his will was proved by both the executors.

In April, 1859, part of the testator's real estate was sold for £1425 to the Margate Railway Company by the trustees, who employed the defendants as their joint solicitors in the matter of the sale, and otherwise in relation to the affairs of the testator, and, as the bill alleged, the defendants perused and were well acquainted with the contents of the will of the testator, and with the rights of his widow and children thereunder. The purchase money, which amounted, principal and interest, to about £1500, was received by the defendants under the authority of John Ginder and Grace Lee as trustees. Out of the moneys so received, £360 was applied in the purchase of a freehold property, which was conveyed to John Ginder alone; but after his death a conveyance of this property to Grace Lee from John Ginder's heir-at-law was obtained by the defendants. Another sum of £200 was paid to the plaintiff Emily Curling,

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206] one of testator's daughters, as an *advancement on her marriage, in pursuance of the proviso for that purpose contained in testator's will. John Ginder died on the 30th of August, 1866, insolvent. In September, 1866, Grace Lee applied to the defendants for an account of the investments of the trust estate, and the defendants furnished her with an account, from which it appeared that various sums, amounting to about £800, had been from time to time, between April, 1861, and January, 1865, paid to John Ginder, the trustees being debited with the moneys as having been paid "to Mr. Ginder." This money having been employed by John Ginder in various speculations, and, on his death in a state of insolvency, lost to the trust estate, the bill was filed in January, 1871, by Grace Lee and her children, for the purpose of compelling the defendants, Messrs. Sankey, to make good the loss occasioned by paying over the money to John Ginder alone, without, as it was alleged, the authority or sanction of his co-trustee, the plaintiff Grace Lee.

The defendants, by their answer, admitted their employment as solicitors by the trustees, and the receipt of the moneys, and stated that, so far as they had anything to do with moneys forming part of the testator's estate, Grace Lee acted entirely upon the advice of her brother John Ginder, ratified his acts, and left to him the conduct of the business; and that she authorized the defendants, expressly and by her knowledge of and acquiescence in what was being done (when she did not specially authorize them herself), to look upon and act upon instructions from him, as joint instructions from her and him together. It appeared that £700 of the money was for some time retained in their hands, and advanced by them on temporary loans to various clients pending final instructions from Grace Lee and John Ginder (to whom they allowed interest, paying it to John Ginder by the joint instructions of himself and Grace Lee), and until an eligible permanent investment could be made. The moneys, when paid over to J. Ginder, were, as the defendants alleged, with the consent and acquiescence of Grace Lee, invested in the purchase of ships, while parts remained uninvested in his own hands. They also alleged that part of the moneys received by Grace Lee as income consisted, to her knowledge, 207] of profits resulting from such purchases *of ships, and moneys paid by J. Ginder in the way of interest on moneys so retained in his hands. They also alleged that, upon the death of J. Ginder, Grace Lee had, to the exclusion of his other creditors, received the whole of his personal estate in satisfaction of her claim. The Statute of Limitations was also set up as a bar to any claim by the plaintiffs.

In answer to an averment in the amended bill that Grace Lee never gave any instructions as to the £700, and that the money was, in fact, borrowed by the defendants with full knowledge of the trust, and used by them in their business, the defendants denied such averment, stating that it was entirely owing to the instructions of John Ginder and Grace Lee, given by her, as already stated, that no permanent investments were made of the money in the names of the trustees or either of them; and that Grace Lee desired that as much interest on it as possible should be made. In her affidavit, Mrs. Lee denied that she had, expressly or by acquiescence, authorized the defendants to look to instructions from John Ginder as instructions from them jointly. She stated that in 1861 John Ginder told her that the money was in the hands of the defendants, and that they would pay interest for it or invest it. She never heard anything further about the investment of the money, either from Ginder or from the defendants. Ginder from time to time paid her moneys, which he said were for interest in the hands of the defendants. It appeared that in August, 1869, she went to Canterbury, accompanied by her son-in-law Edwin Curling, and saw one of the defendants at his office. "I said to him, 'You are aware that I knew nothing of the way in which the greater part of this money has been expended.' He replied that he thought I was aware, and had given J. Ginder authority to receive it. I said that I had not done so, and that I thought it was his duty to have apprised me of it I called his attention to the account, and said, 'You don't begin to make payments to my brother till May 6. What does the check April 29 mean? You did not pay me that money.' He replied that he supposed it had been drawn out for me. I said it was not by my authority. He then said, 'Did I pay you the two checks for Emily?' I said, 'Yes, you gave them to me; and if my presence was required when you settled that business, why was it not *when [208 you paid these sums to my brother?' He said, 'I know you did not give your authority, but I quite supposed you knew it was being done.'"

The account given by Mrs. Lee of this interview was confirmed by her son-in-law, who was present at it, and her account of a subsequent interview to the same effect was also confirmed by her daughter, Helena Lee, who was with her. The defendants, by their affidavits, denied that these conversations were correctly stated; and they had filed a concise statement, with interrogatories for the examination of Grace Lee, and served her with notice for her cross-examination upon her affidavit. From her illness at the time, her answer and cross-examination had to be postponed; and she died on the 29th of December, 1871, without having answered the concise

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statement, or having been cross-examined. Edwin Curling and Helena Lee had not been cross-examined.

Mr. *Eddis*, Q.C., and Mr. *H. J. M. Williams*, for the plaintiffs: The defendants, who were solicitors of the trust, admit the receipt of money representing the proceeds of testator's real estate, and having, with notice and full knowledge of the trust, permitted one of the trustees, their client, to commit a manifest breach of trust, they are liable to the *cestuis que trust* for the amount lost. Although in *Maw v. Pearson*.⁽¹⁾ the agent of a trustee was held accountable to his employer only, and not to the *cestuis que trust*; if, knowing that a breach of trust is being committed, the agent interferes and assists in that breach of trust, he is personally answerable as a participator in the breach of trust: *Attorney General v. Corporation of Leicester* ⁽²⁾; and where solicitors have taken upon themselves to receive the trust moneys and intermeddle with the performance of the trust, they become liable to make good the money to the *cestuis que trust*, and are subject to the same responsibilities as trustees: *Hardy v. Culey* ⁽³⁾; *Lewin on Trusts* ⁽⁴⁾. Being fixed with knowledge 209] of the trust, and notice that the *moneys, of which they constituted themselves borrowers, were trust moneys, they were bound not to part with them for purposes inconsistent with the trust, and could only discharge themselves from liability by paying such moneys into the proper hands pointed out by the trust deed, upon the joint receipt or joint authority of the two trustees.

Mr. *Kay*, Q.C., and Mr. *Horton Smith*, for the defendants: Assuming that the defendants, by borrowing the trust moneys with notice of the trust, became in any sense constructive trustees, no one can enforce against them any liability greater than that which they undertook when they received the trust money—that of paying back the money with interest at 5 per cent: *Stroud v. Gwyer* ⁽⁵⁾; *Ex parte Watson* ⁽⁶⁾; *Vyse v. Foster* ⁽⁷⁾. They have fulfilled their contract by paying back the money with interest, and they were not bound to know the state of the assets, and cannot be made liable for any misapplication of the fund by J. Ginder, whose receipt, as one of the trustees and executors, operated as a complete discharge to the defendants on payment by them of the trust moneys: *Charlton v. Earl of Durham* ⁽⁸⁾. But in any case the claim is barred by delay and acquiescence, as, independently of the evidence to show that Grace Lee knew from the beginning all that was being done and sanctioned the

⁽¹⁾ 28 Beav., 196.

⁽²⁾ 7 Ibid., 170.

⁽³⁾ 33 Beav., 365.

⁽⁴⁾ 5th Ed., p. 156.

⁽⁵⁾ 28 Beav., 180.

⁽⁶⁾ 2 V. & B., 414.

⁽⁷⁾ Law Rep., 8 Ch., 309.

⁽⁸⁾ Law Rep., 4 Ch., 433.

investments, she took no step to dispute it from 1866, when she was furnished by the defendants with the account, until 1871; and even where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief: *Beckford v. Wade* ⁽¹⁾; *Bell v. Bell* ⁽²⁾; *Ex parte Hasell* ⁽³⁾.

Mr. Eddis, in reply: *Charlton v. Earl of Durham* is distinguished, as the money there was personal estate, and paid to the defaulting party as *executor and not as trustee; [210 and it is expressly stated by Lord Hatherly ⁽⁴⁾, "There are good reasons why the receipt of one executor should suffice, as he may be called upon to pay debts, and this rule therefore prevails until you can fix the debtor with much more precise notice than we have here, that the estate has been all administered." Here the money was the proceeds of real estate devised upon trusts, of which defendants were fully cognizant, and as the money has been misapplied and lost by the conduct of the one trustee to whom alone it was improperly paid over, the defendants are in the position of constructive trustees, and bound to make good the loss. The objection of delay does not apply, and in any case cannot prevail, the *cestuis que trust* being, for the most part, married women and infants.

Jan. 14. SIR JAMES BACON, V.C., after stating the case, and referring to the evidence, continued: It is not disputed that the defendants were employed by and acted as the solicitors of the trustees of John Lee's will; that in their characters of such solicitors they received into their hands the purchase moneys; that they applied part of such moneys according to the trusts of the will with which they were necessarily acquainted; that other part of such moneys was invested by them in temporary securities, pending final instructions from the trustees, or until an eligible permanent investment could be made of it. It does not appear that any such investment was ever made, but the defendants allege that at various times and in various amounts the whole of the latter sum was paid by the defendants to John Ginder alone, without any further communication with Grace Lee. Now the money having been placed in the defendants' hands by the two trustees, they can only be discharged of such moneys by the joint receipt or by the joint authority of the two persons who had so entrusted the defendants. The case of the defendants is, that although they took no such receipt, they acted under the authority of one of the trustees in making such payments

⁽¹⁾ 17 Ves., 87, 97.

⁽²⁾ Lloyd & G. temp. Plunk., 44.

⁽³⁾ 3 Y. & C. Ex., 617.

⁽⁴⁾ Law Rep., 4 Ch., 439.

as they did make to the other of them. In their answer 211] *(par. 8), they say that G. Lee left to her brother J. Ginder, "the conduct of the business, authorizing us to look upon and act upon instructions from him as joint instructions from her and him together." Upon this matter of fact there is a direct conflict. Not only did G. Lee positively deny as well such authority as such knowledge of J. Ginder's acts as the defendants impute to her, but another person (E. Curling) present at an interview in the month of August, 1869, between G. Lee and Herbert T. Sankey, has deposed to the statement addressed to her by the last named defendant, "I know you did not give your authority, but I quite supposed you understood it was being done." The defendants in their evidence, filed several months after the affidavit I have last referred to, do not, in my opinion, effectually contradict the deposition of Edwin Curling, for I cannot adopt the general statement in the 4th paragraph of their affidavit of March, 1872, where the defendant H. T. Sankey denies that the conversations deposed to in the plaintiff's affidavits are correctly stated, as such a contradiction. Weighing the evidence then upon this matter of fact, I am forced to the conclusion that the defendants have failed to prove that any such authority as they allege was given by Grace Lee to the defendants for making such payments as they did to J. Ginder.

The consequence of this conclusion is, that the defendants are still liable to make good to the trust estate the amount of trust moneys which they received by the authority of the two trustees, and from which they have not been discharged by any act or authority of the same two trustees. It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to *cetuis que trust* in respect of trust moneys coming to his hands merely in his character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognizant, is personally liable for the consequences which may ensue upon his so dealing. And upon this latter principle I think the liability of the defendants is established; for if I were to adopt the allegations of the defendants, that G. Lee had authorized them to act under the instructions of J. 212] Ginder (which *I cannot do, having regard to the evidence I have mentioned), such alleged authority could only be taken as being applicable to the trusts of the moneys which had been deposited with them, "until," as the defendants themselves say, "an eligible permanent investment could be made of it." There is no trace of any such investment having been made or even proposed, of any communication on that subject having

been at any time made to G. Lee, nor any explanation of the circumstances under which the various payments were made to J. Ginder: the defendants insisting that it was "no part of their duty to inquire what it was intended to do, or to see what was done, with such moneys." It was at least their duty, as they themselves have stated, to see that the trust funds which they had received went back into the hands from which they had received it, or were applied by the express direction of the persons who, as they say, were the owners of such money; and this, it is clear, they have omitted to do. It is unnecessary to advert to several topics of defense which were suggested. The Statute of Limitations, alluded to in the answer, is no ground of defense; the laches imputed to Grace Lee cannot, under the circumstances, be sustained, and could not in any case be alleged against the present plaintiffs; nor is there any reason for the suggestion which the defendants make, that the moneys improperly paid to J. Ginder were invested by him in the purchase of ships, which after his death were sold by G. Lee. It was insisted, upon the authority of *Charlton v. Earl of Durham* (¹), that the receipt of J. Ginder was a sufficient discharge to the defendants for the moneys which the defendants had paid to him. No formal evidence has been adduced of any receipt by J. Ginder. But, assuming that this might be supplied, the decision referred to cannot govern the present case. The receipt of one executor was in that case held to be sufficient, the subject to which it related being personal estate. The late plaintiff, G. Lee, and J. Ginder, although they were executors, were also trustees and acted as trustees, and in no other capacity. The moneys in question were the proceeds of real estate of which they were trustees, and the receipt of one of them alone could not be a sufficient discharge. *I mention [213 these matters only because they were more or less alluded to in the course of the discussion, and not because they have any direct bearing upon the case which is to be decided. A considerable loss has been sustained; the cause of that loss cannot be imputed to the late plaintiff G. Lee, or to the present plaintiffs. It must, in all justice, be repaired, and that can only be done by declaring that the defendants are liable to make good so much of the trust funds which came to their hands as have not been applied according to the trusts of the will of John Lee. And for this purpose the account prayed for by the bill must be directed, and the defendants must be ordered to pay the costs of the suit up to the present time.

Solicitors: Mr. A. C. Spaul; Messrs. Kingsford & Dorman, agents for Messrs. Sankey, *Sen & Flint*, Canterbury.

(¹) Law Rep. 4 Ch., 433.

[Law Reports, 15 Equity Cases, 219.]

V.C.B. Jan. 11, 1873.

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*WATSON v. COX.

[1870 W. 57.]

Practice--Rescinding Contract after Decree for Specific Performance—Absconding Defendant.

After a decree for specific performance of a contract to take a lease of a house, and an order on further consideration for payment of the sums certified to be due from him (for costs and damages), defendant having absconded without paying the amount, the court, on motion by plaintiff, ordered the contract to be rescinded and all further proceedings in the suit stayed, except as to the recovery of the sums already ordered to be paid.

MOTION on behalf of plaintiffs that an agreement dated the 5th of May, 1868 (of which specific performance had been decreed); might be rescinded, and all further proceedings in the suit stayed, except as to the recovery of costs already ordered to be paid. The plaintiffs had agreed to grant a lease of a house to the defendant, and filed their bill for specific performance. On the 22d of March, 1870, a decree was made for specific performance, with an inquiry as to title and damages. On the 25th of March, 1871, an order was made on further consideration that defendant *should pay the sums mentioned in the certificate, and that plaintiffs should execute a lease to defendant upon payment by him of the costs when taxed and the sums mentioned in the certificate. The defendant had absconded without paying the amount ordered to be paid by him, and the object of the present motion was to get rid of the contract so as to enable plaintiffs to find a tenant for the house.

Mr. G. W. Laurance, in support of the application, cited *Fo-ligno v. Martin* ⁽¹⁾; *Sweet v. Meredith* ⁽²⁾.

SIR JAMES BACON, V.C., made the order.

Solicitors: Messrs. *Paule & Fearon*.

⁽¹⁾ 16 Reav., 586.

⁽²⁾ 4 Giff., 207.

[Law Reports, 15 Equity Cases, 223.]

C.J.B., Feb. 1, 1873.

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*Ex parte HARDING. In re FAIRBROTHER.

Bankruptcy—Reputed Ownership—Order and Disposition—Bill of Sale executed before, but registered after, the filing of a Petition for Liquidation—Possession of Grantor to continue till Default in Payment on Demand—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, sub-s. 5.

A bill of sale was executed on the 9th of January, 1872. On the 23d of January the grantor filed a petition for liquidation. On the 30th of January the bill of sale was registered, and on the 12th of February the trustee under the liquidation took possession of the property. The bill of sale provided that the grantor should continue in possession of the property until default in payment upon de-

mand of what should be due to the grantee. The grantor remained in possession of the property until the 12th of February, no demand for payment or possession having been made by the grantee. On that day the grantee authorized an agent to take possession, but no possession was taken by him:

Held (reversing a decision of the County Court judge at Manchester), that the trustee was entitled to the property as against the bill of sale holder.

Goods comprised in a bill of sale, which entitles the holder to take possession upon default in payment after demand, remain, notwithstanding the registration of the bill of sale, until demand is made in the reputed ownership of the grantor.

Observations upon *Ashton v. Blackshaw* (*), and *Ex parte Homan* (*).

THIS was an appeal from a decision of the judge of the County Court at Manchester. *On the 9th of January, 1872, an [224 indenture was executed between Christopher Fairbrother, a beerhouse keeper, of the one part, and his brother James Fairbrother of the other part. This deed contained recitals that James Fairbrother had, on the 2d of January, 1872, advanced to Christopher £20, and had at the same time, at his request, entered into a written guarantee with John Shipley to secure the payment of £38 due to him by Christopher, and that Christopher at the time of such advance agreed with James to secure the payment of the £20 and the £38 in manner thereafter appearing; and it was witnessed that, in pursuance of the agreement, and in consideration of the advance of the £20, and of the guarantee having been given, Christopher covenanted with James that he, his heirs, executors, or administrators, would on demand pay to James, his heirs, executors, administrators, and assigns the sum of £20, with interest thereon at 5 per cent per annum, and also would on demand pay to James, his heirs, executors, administrators and assigns, any sum or sums of money which he, his heirs, executors, or administrators, might pay in respect of the guarantee, with interest at the rate aforesaid: And it was thereby also witnessed that in consideration of the premises Christopher granted and assigned unto James, his executors, administrators, and assigns, all and every the household goods and furniture, stock in trade, plate and plated articles, household linen, books, china and other household effects whatsoever, horses, carts, saddles, harness, and other accoutrements, and other goods, chattels and effects, then being or which thereafter should be in or about the dwelling house occupied by Christopher, and his place of business, to have, hold, receive, take and enjoy the said several premises thereby assigned to James, his executors, administrators, and assigns, absolutely. The deed contained a proviso for reassignment in case Christopher, his heirs, executors, or administrators, should on demand thereof made in writing by James, his heirs, executors, administrators, or assigns, pay the £20, and also all such sums as might have been paid under the guarantee, together with interest thereon

(*) Law Rep., 9 Eq., 510.

(*) Law Rep., 12 Eq., 598.

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respectively. And it was thereby agreed and declared that after default should have been made by Christopher, his heirs, executors, administrators, or assigns, in payment of the £20 and 225] other *moneys contrary to the tenor of the proviso, it should be lawful for James, his heirs, executors, administrators, or assigns, to seize and take possession of any household goods, furniture, stock in trade, and other goods, chattels, and effects, which should or might from time to time be substituted in lieu of the said household goods and furniture, stock in trade, goods, chattels, and effects, or which should for the time being be found on the premises, and to sell the same, and out of the moneys arising from the sale to pay what should be due on the security: And it was thereby declared that until default should be made in payment of the £20 and other moneys (if any) and interest contrary to the tenor of the proviso thereinbefore contained, or until default should be made in payment of the interest, it should be lawful for Christopher, his heirs, executors, or administrators, to hold, use, and possess the premises thereby assigned without any hindrance or disturbance of or by James, his executors, administrators, or assigns.

On the 23d of January, 1872, Christopher filed a petition for liquidation by arrangement, and on the 12th of February, 1872, E. B. Harding was appointed trustee of his property. On the 30th of January the indenture of the 9th of January was registered under the Bills of Sale Act. On the 12th of February the trustee took possession of the goods and chattels comprised in the indenture, and on the same day James authorized one Thomas Wilde to take possession of them under the bill of sale. No demand for payment was ever made by James upon Christopher, and there was no attempt to take possession of the property. On the 23d of February the trustee sold the goods by public auction. James applied to the trustee for payment of £59 7s. 9d., which was the amount due to him under the indenture. The trustee refused to pay, and an application was made to the judge for an order for payment. The judge considered himself bound to hold, upon the authority of *Ashton v. Blackshaw* ⁽¹⁾ and *Ex parte Homan* ⁽²⁾, that the goods were not, when the petition for liquidation was filed, in the order or disposition of Christopher as reputed owner with the consent of the true owner, and therefore ordered the £59 7s. 9d. to be paid to James. The trustee appealed.

226] *Mr. Winslow, for the appellant: The County Court judge decided against the trustee because he thought that *Ex parte Homan* ⁽¹⁾ was an adoption of the *dictum* of Vice Chancellor Malins in *Ashton v. Blackshaw* ⁽²⁾, that the order and dis-

⁽¹⁾ Law Rep., 9 Eq., 510.

⁽²⁾ Law Rep., 12 Eq., 598.

position clause of the Bankruptcy Act does not apply to the case of a registered bill of sale. That this is not the law is shown by a series of authorities. In *Freshney v. Carrick* ⁽¹⁾ it was held that a provision in a bill of sale that the grantor should hold the goods until default in payment, was the best evidence that he was in possession with the consent of the true owner. In this case the bill of sale was registered. So, too, in *Reynolds v. Hall* ⁽²⁾ and in *Badger v. Shaw* ⁽³⁾, it was held that the registration of a bill of sale does not prevent the goods comprised in it from being in the order and disposition of the grantor as reputed owner. *Stansfield v. Cubitt* ⁽⁴⁾ and *Spackman v. Miller* ⁽⁵⁾ are to the same effect. The dictum of Vice Chancellor Malins in *Ashton v. Blackshaw* is clearly inconsistent with the settled law, and it was not necessary to his decision in that case, for there the bill of sale was held void as against assignees in bankruptcy, because it was not registered. As to *Ex parte Homan*, the facts were very different from those of the present case. The bill of sale holder had a right to take possession after the commission of an act of bankruptcy of which he had no notice. He would have no notice of the filing of a petition for liquidation for some days afterwards. In the present case nothing whatever was done by the respondent till after the trustee was appointed. In the unreported case of *Ex parte Brown*, mentioned in Robson's Law of Bankruptcy ⁽⁶⁾, it was held that the registration of a bill of sale did not prevent the application of the reputed ownership clause. The law is, therefore, clearly in favor of the appellant. The goods were in the order or disposition of the liquidating debtor as reputed owner with the consent of the true owner at the time when the petition for liquidation was filed, and the trustee is therefore entitled to them.

*Mr. *Finlay Knight*, for the bill of sale holder: It must [227 be admitted that the observations of Vice Chancellor Malins are somewhat at variance with the common law cases. But what his honor is reported to have said ⁽⁷⁾ as to *Stansfield v. Cubitt* ⁽⁴⁾ is consistent with *Martindale v. Booth* ⁽⁸⁾, where it was held that the sheriff could not seize goods though the debtor who had assigned them continued in possession of them. There is nothing in the report of *Ex parte Homan* ⁽⁹⁾ to show that the bill of sale holder, when he took possession, had no notice of the petition for liquidation. In that case your honor distinctly referred to *Ashton v. Blackshaw* ⁽¹⁰⁾ with approval. The dates in the present

(1) 1 H. & N., 653.

(2) 4 Ibid., 519.

(3) 2 E. & E., 472.

(4) 2 De G. & J., 222.

(5) 12 C. B. (N. S.), 659.

(6) 2d Ed., p. 419.

(7) Law Rep., 9 Eq., 517.

(8) 8 B. & Ad., 498.

(9) Law Rep., 12 Eq., 598.

(10) Ibid., 9 Eq., 510.

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case are very similar to those in *Ex parte Homan*. It is very material to look at the dates. Some interval must always elapse between demand and possession. At law it has been held that a demand must be reasonable; time must be given to the debtor to find the money. A great part of the property was furniture, and to that the doctrine of reputed ownership does not apply: *Re Hawkins* ⁽¹⁾.

SIR JAMES BACON, C. J. : This appeal raises a question with regard to *Ashton v. Blackshaw* and *Ex parte Homan*. I think that the decisions in both those cases have been strangely mistaken. The decision of Vice Chancellor Malins in *Ashton v. Blackshaw* is clearly in accordance with well established law. My decision in *Ex parte Homan* has been misunderstood. There is probably an error in the report, but if I said what is there attributed to me as to the effect of the decision in *Ashton v. Blackshaw*, I should desire to recall it. But my decision in *Ex parte Homan* was clearly in accordance with the law as long established. The main argument in that case was that the execution of the bill of sale was in itself an act of bankruptcy, and my decision turned upon that point. It appears from the report ⁽²⁾ that the bill of sale was executed on the 7th of July, and that on the same day, but afterwards, the debtor filed a petition 228] *for liquidation. On the 8th of July a demand for payment of the money was made in accordance with the terms of the bill of sale, and, default in payment being made, possession was taken on the same day. The bill of sale was registered on the 19th of July, and the goods were sold on the 18th and 19th of July. The debtor was adjudicated a bankrupt on the 26th of July, the adjudication being founded upon the failure to comply with the requirements of a debtor's summons which had been served on the 2d of July. There was no suggestion that the creditor, when he took possession, knew of any act of bankruptcy. From the time that possession was taken all question of order or disposition was at an end. The sale took place before the adjudication of bankruptcy, and the transaction was thus completed. The only act of bankruptcy upon which the adjudication was made was the failure to obey the debtor's summons. The case was, therefore, one of a valid bill of sale duly registered and acted upon, and the creditor's title perfected by taking possession and sale before adjudication of bankruptcy or notice to the creditor that any act of bankruptcy had been committed. That was the ground of my decision in that case, and it is clear, from the subsequent case of *Ex parte Brown*, mentioned in Mr. Robson's book, that I had no intention of deciding that the registration of a bill of sale prevents the opera-

(1) 20 W. R., 110.

(2) Law Rep., 12 Eq., 601.

tion of the reputed ownership clause. There is nothing in the decision of Vice Chancellor Malins in *Ashton v. Blackshaw* ⁽¹⁾ inconsistent with this. In the present case the goods were in the possession of the debtor as reputed owner at the commencement of the liquidation with the consent of the true owner, and the title of the trustee must, therefore, prevail. The order of the County Court judge will be discharged, and the trustee must have his costs in the court below.

Solicitors for the appellant: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale, Shipman & Seddon, Manchester*.

Solicitors for the respondent: Messrs. *Cowdell, Grundy, & Browne*, agents for Messrs. *Toy & Broadbent, Ashton-under-Lyne*.

[Law Reports, 15 Equity Cases, 229.]

V.C.M. Jan. 28, 1873.

*McKEWAN v. SANDERSON.

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[1872 M. 198.]

Plea — Fraudulent Preference — Averments.

A plea that the plaintiff's claim is founded on a contract giving the plaintiff a fraudulent preference over other creditors of a debtor in liquidation, must aver that proceedings in the liquidation had commenced or were imminent when the contract was entered into.

PLEA. The plaintiff sued as the registered public officer of the London and County Banking Company. The allegations of the bill were to the following effect: In May, 1864, James Sanderson, the brother of the defendant, opened an account with the Holborn branch of the plaintiff's bank, and in the usual course of business the bank discounted bills for him. At the end of August and the beginning of September, 1870, James Sanderson was indebted to the bank to the amount of £6800, against which sum the bank held acceptances which they had discounted for him. He was then in difficulties, and proposed to make some arrangement with his creditors for liquidation, and desired that the bank should not prove or put forward their claim against him, or come into competition with his other creditors, or make him a bankrupt, and that they should not, by pressing the other drawers or acceptors, diminish the amount which might be recovered from them. The defendant was in some way interested in carrying out the arrangements with James Sanderson's creditors, and in keeping him out of bankruptcy and diminishing the claims on his estate, and he, in fact, subsequently paid the composition which the creditors agreed

(1) Law Rep., 9 Eq., 510.

to accept in discharge of their debts. In September, 1870, an arrangement was come to by which the bank were to forbear pressing James Sanderson, and the defendant was to guarantee that the bank should not lose more than £2000 on the account. 230] This arrangement was embodied in a *letter addressed to the trustees of the bank and signed by the defendant. The letter was as follows:

“ 7th Sept., 1870.

“ Gentlemen, Referring to the statement showing a list of acceptances to the drafts of Mr. James Sanderson and acceptances of Mr. James Sanderson to various drafts, amounting in the aggregate to the sum of £7218 1s. 4d., under discount with your bank, and the various good considerations, I hereby guarantee the bank that the ultimate loss to the bank in respect of the said acceptances and drafts shall not amount to more than the sum of £2000. And I hereby undertake to pay to the said bank, within nine months from this date, such sum as shall be found to be then due to the bank in respect of acceptances and drafts beyond the loss above mentioned, viz., £2000; and I further undertake to sign such further or other guarantee embodying the terms of this guarantee and arrangement to be settled and approved by our respective solicitors.

“ Yours obediently, George Sanderson.

“ Witness, A. H. Miller, 6, Old Jewry, E. C.”

In consideration of the guarantee the bank forbore to take proceedings in bankruptcy against James Sanderson, or to prove against his estate, and his affairs were liquidated by arrangement with and for the benefit of his creditors. The defendant proved against the estate for £1149 18s. 11d. He gave no further guarantee. Certain dealings then took place between the parties by which the liability on the bills had become reduced to £5175 15s. 1d., and certain letters were set forth in the bill in which the defendant had authorized such dealings, as well as some correspondence in which the bank endeavored to obtain some settlement of the remaining liability. The bill then stated that the defendant alleged some injudicious dealings with the bills, and that the investigation of the truth of his allegations would involve a separate investigation of the facts regarding each bill, and such questions could not be conveniently decided 231] at common law, and that the facts regarding *them were complicated and could not be dealt with except by the court. The prayer was for a declaration to the effect that the defendant was liable to pay the sum of £6,896 3s. 4d., deducting £2,000; and for consequential relief. The defendant pleaded to the whole bill. The plea contained the following averments: James

Sanderson was at the date of the guarantee in embarrassed circumstances, and had a large number of creditors, by whom he was threatened with proceedings in bankruptcy, and in order to avoid such proceedings it was proposed or contemplated by James Sanderson that a petition for liquidation under the Bankruptcy Act should be presented and a special resolution of his creditors passed, whereby, or by virtue whereof, he might be released from his debts without being adjudicated bankrupt; the proposed arrangement for creditors required for its validity the concurrence in its favor of a certain majority in number and value of the creditors of James Sanderson, and such majority in number and value could not have been obtained in face of the opposition of the bank; and the bank threatened and intended to oppose the arrangement proposed by James Sanderson for the liquidation of his debts, and in order to get rid of the opposition of the bank as a creditor of James Sanderson, he entered into the agreement set forth in the bill. James Sanderson had many creditors besides the bank, to whom the arrangement between the bank and the defendant was not made known before or at the time of its being entered into, and the arrangement was made without their knowledge or consent. The bank, in consideration of the agreement, withdrew or withheld opposition. The plaintiff, as public officer of the bank, in October, 1871, commenced an action at law against the defendant to recover the amount alleged to be due to the bank under or by virtue of the guarantee, and had by the declaration claimed, by virtue of the guarantee, £3,000. The defendant appeared, and pleaded to the action that the agreement in the declaration, which was the same as that in the bill, was made between the bank and the defendant without the knowledge and consent of the creditors of James Sanderson, who were to be bound and affected by the *proceedings in the Bankruptcy Court, and [232 for the purpose of giving the bank a fraudulent preference over other creditors of James Sanderson contrary to the form of the statute in such case made. The plea was heard on demurrer on the allegation that it was bad in substance. A judgment was given against the plaintiff's demurrer and in favor of the defendant on the plea. The plea to the bill then pleaded, that under the circumstances the agreement was one made between the bank and the defendant without the knowledge or consent of the creditors of James Sanderson, who were to be bound and affected by the proceedings in the Bankruptcy Court, and a fraudulent preference over other creditors of James Sanderson.

Mr. Glasse, Q.C., Mr. Cottrell, and Mr. R. Vaughan Williams (of the Common Law Bar), in support of the plea: The only equity alleged by the bill is, that the matter is too complicated

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for a Court of Common Law. But the plaintiff in fact only comes to this court because he has tried and failed at law. The case, as appearing from the bill and the plea, results in the bank being paid in full, deducting the £2,000, and not coming in to vote as to whether a composition should be accepted. It is in effect buying off a creditor who might prevent the arrangement being carried out; and that is what is called a fraudulent preference, whether the creditor is bought off by means of the debtor's estate or otherwise: *Hall v. Dyson* ⁽¹⁾; and it is open to any one to take this objection to a transaction, even if he is a party to it: *Jackman v. Mitchell* ⁽²⁾, or though the arrangement merely gives an additional security to the creditor to be benefited by it: *Ex parte Saddler and Jackson* ⁽³⁾. These cases simply carry out the principle of *Mawson v. Stock* ⁽⁴⁾, and *Mare v. Sandford* ⁽⁵⁾ is a recent case of the same description. A similar plea was also upheld in *Daughlish v. Tennent* ⁽⁶⁾. [The VICE CHANCELLOR: Is it averred anywhere in the plea that any proceedings in bankruptcy had commenced or were *imminent on the 7th of September, 1870? If such allegations were contained in the bill it would be a ground for demurrer.] It is immaterial whether there were any bankruptcy proceedings pending or not. If proceedings were pending the plaintiffs would be part of the statutory constituency for deciding upon accepting the composition. But if not, it was an arrangement such as would leave the bank in the position of a creditor, and yet give them an advantage over the other creditors. Unless the transaction amounted to a purchase of the bank debt by the defendant, so as to put it out of their power to claim against the estate of James Sanderson, it cannot stand, even though no proceedings had commenced. As the arrangement stands, the endorser of the bills are prejudiced by it.

Mr. Cotton, Q.C., and Mr. Waller, for the plaintiff, were not called upon.

SIR R. MALINS, V.C.: I think this plea must be overruled. It is a very important case for the bank, and under a different state of circumstances I possibly should have come to a different conclusion. The transaction as stated by the bill is this: The plaintiff is the registered public officer of the London and County Bank. In the month of May, 1864, James Sanderson, who I suppose must have been a trader, opened an account with the London and County Bank. In the latter part of 1870 the bank were holders of a great number of bills, of some of which James Sanderson was acceptor, of some of which I suppose he was the

⁽¹⁾ 17 Q. B., 785.

⁽²⁾ 13 Ves., 581.

⁽³⁾ 15 Ibid., 52.

⁽⁴⁾ 6 Ves., 300.

⁽⁵⁾ 1 Giff., 288.

⁽⁶⁾ Law Rep., 2 Q. B., 49.

drawer, and of some of which the endorser. They amounted together to £7218. It seems the bank were uneasy at the state of the account, and threatened proceedings against James Sanderson in bankruptcy. In this state of things James Sanderson's brother, the defendant, says in substance, "You hold these bills, and if you will forbear taking proceedings in bankruptcy against my brother I will guarantee that within nine months, whatever you recover on the bills, you shall not lose more than £2000 and I will pay the whole amount due upon the bills less £2000." [*His honor then read the guarantee set forth in the bill [234 and the statements relating to it, and continued:] The bill does not state when the liquidation commenced, or whether it was pending at that time, or whether it was done by arrangement long after, though it is plain that there was some kind of arrangement between James Sanderson and his creditors afterwards. Then the bill states that the arrangement between the bank and the defendant at the date of the guarantee was, that the bank were to do what they could to procure payment of the bills from the other persons liable, and that they proceeded in their discretion, and in most part with the concurrence of James Sanderson and the defendant, to realize the bills, and that the claims of the bank against James Sanderson were reduced to £5176. Then it states that no payment has been made by the defendant on account of his guarantee. [His honor then stated the effect of the prayer, and continued:] It appears by the plea that an action on the guarantee has been brought by the London and County Bank against the defendant in this cause, and that there has been a plea and a demurrer, which demurrer has been overruled. The action, therefore, is now pending on this guarantee. I give no opinion as to whether this is a proper case for law or equity, and I give no opinion as to the law or the equity. That will have to be considered hereafter; but the ground of this plea is that there was an improper arrangement between the debtor and his creditor to the detriment of the other creditors, and the doctrine of this court is appealed to which was laid down so repeatedly by Lord Eldon, and finally in the case, always referred to, of *Jackman v. Mitchell* (*). It is a doctrine founded on the soundest principles, namely, that whenever there are proceedings in bankruptcy or insolvency, or any arrangement between a debtor and his creditors generally, and one of the creditors stipulates either for the payment of a greater dividend to him than is paid to the other creditors, or for any collateral advantage whatever, even such as giving the right to purchase a horse, or any advantage whatever not common to the creditors, any payment made will be ordered to

(*) 13 Ves. 581.

235] be repaid, any *security given will be ordered to be given up, and this court will treat the whole thing as fraudulent against the other creditors; and anything done in favor of the creditor who obtains this advantage will be set aside by this court. That principle has been frequently acted upon. I refer to *Jackman v. Mitchell* ⁽¹⁾ because it has been cited, but *Geere v. Mare* ⁽²⁾ is a case on the point at law; and finally, it was very much considered by Vice Chancellor Stuart in *Mare v. Sandford* ⁽³⁾, which, as well as some other cases, arose under the same bankruptcy as *Geere v. Mare*.

Mr. Glasse very much relied on the case of *Hall v. Dyson* ⁽⁴⁾, which certainly goes on the very broad principle that whenever any bankruptcy proceedings are commenced, even although the person getting the advantage has not been a party, the principle must apply, and he would fail in attempting to assert his right to any security which he might have secured.

If therefore in this case, on the 7th of September, 1870, when this guarantee was given, there had been any pending proceedings in bankruptcy or liquidation, I do not express any opinion what the result would have been, because I have not heard Mr. Cotton or Mr. Waller; but this bill being met by plea the pleader is bound to aver facts which are a bar to the plaintiff's bill; and in order to bring this case within the doctrine of *Hall v. Dyson*, it is absolutely necessary that it should appear before the court that there were proceedings pending at that time, or that they were so imminent that they might be considered as virtually pending. I therefore asked counsel to point out any averment in the plea that there were any proceedings of the kind so immediately after the guarantee, that I could consider the guarantee a violation of the rights of creditors. There is no such averment; and for all that is averred, it may have been two years before any proceedings were taken to make an arrangement between James Sanderson and his creditors. I confess I think it most probable, if I were to go upon conjecture, that it was so; because I infer that the London and County Bank were the largest creditors, and the defendant, for considerations which were valuable to him at that time, namely, for 236] the purpose of rescuing his brother by entering *into this guarantee, probably did postpone the evil day and enable him to go on for a considerable time. The plea is therefore totally wanting in the only averment which could be a defense to the suit, and on that ground I think the defendant fails to bring his case within any of the authorities which have been referred to, and the plea must be overruled.

Solicitors: Messrs. *Deane & Chubb*; Mr. *J. R. Miller*.

⁽¹⁾ 13 Ves., 581.

⁽²⁾ 2 H. & C., 889.

⁽³⁾ 1 Giff., 288.

⁽⁴⁾ 17 Q. B., 785.

[Law Reports, 15 Equity Cases, 236.]

V.C.M. Feb. 21, 1878.

In re NATIONAL EQUITABLE PROVIDENT SOCIETY.

WOOD'S CASE.

Company — Conditional Application for Shares — Allotment — Contributory — Damages — Costs as between Solicitor and Client — Companies Act, 1862, s. 35.

A signed an application for shares in a company upon condition that he should be appointed secretary, and his acceptance of the office was to be subject to further inquiries, which he had caused to be made respecting the position of the company. The shares were allotted the next day, but A, in consequence of information he received, declined the appointment, and required that the allotment should be cancelled. The company was wound up voluntarily, and A's name was placed on the list of contributories:

Held, that the application for shares was conditional, and the condition not having been fulfilled, A's name must be removed from the register and list of contributories, and as he had been placed there without any justification, he must receive costs as between solicitor and client by way of damages, under sect. 35 of the Companies Act, 1862, for the extra expenses incurred by him.

THIS was a motion on behalf of Henry Richard Hugh Wood, of Birkenhead, Chester, that his name might be removed from the register of members in the National Equitable Provident Society, Limited, in respect of 120 shares. The company was registered in September, 1869, having for its object the receipt of deposits of moneys at interest, to be employed in loan transactions, and on the 25th of November, 1872, a resolution was passed for winding up the company voluntarily, and Mr. William Slater was appointed liquidator for the purpose. The applicant, Henry R. H. Wood, stated in his affidavit that he *had been a lieutenant in the navy, but left the service in [237 1871. In October, 1871, being desirous of obtaining some employment on shore, he inserted an advertisement in a newspaper, and received an answer from John Wall, the then secretary to the above society, stating that he was about to retire, and that the society wanted a secretary in his place. In consequence of this communication he appointed to go to Leicester on the 18th of December, 1871, to meet Mr. Wall, and to ascertain the nature and position of the society. Upon arriving at Leicester from Birkenhead he was met by Mr. Wall and the manager of the company, who resided together, and who invited him to dine with them. After dinner the books of the society were shown to him, from which he was unable, by reason of his inexperience of business, to obtain any useful information. He was given to understand that if he accepted the post of secretary to the society he would be required to take 120 shares of £5 each, which would bear a guaranteed interest of 7 per cent, and that he would have a progressive salary commencing at £100

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per annum. Mr. Wood informed Mr. Wall and the manager that he should not make up his mind as to accepting the situation until he had seen a gentleman named Hobson, who resided in Leicester, and to whom he had a letter of introduction. He was detained so long at the office of the society that when he called upon Mr. Hobson that gentleman had left his office for the day. He however left a letter for him, requesting him to examine the books of the society on his behalf, and he then returned with Mr. Wall and the manager of the society to their office, when they produced a document for him to sign, which he understood to be an agreement to take shares to the amount of £600 if he became the secretary. After being much pressed upon the subject he at length signed the paper on the distinct condition and understanding that it was not to be made use of unless, after hearing from Mr. Hobson, he should accept the secretaryship, and that he would communicate his decision as soon as he had heard from Mr. Hobson. He then proceeded to the railway station accompanied by Mr. Wall and the manager, and returned to Birkenhead the same night.

On the 20th of December he received from Mr. Wall the following letter: "Dear Sir, I enclose you notice of allotment 238] for the *120 A shares you applied for yesterday, and by this post I forward you agreement; if it meets with your approval, please sign and return it, and I will forward you a copy in due course." Enclosed in this letter was the notice of allotment and the agreement, and by these he learned for the first time that, in violation of his agreement, the document he had signed had been made use of for the purpose of allotting him 120 shares in the society. Mr. Wood on the same day received from Mr. Hobson a letter, stating that he had been to the office of the society, and had made inquiries, and found that their capital was between £2000 and £3000; that they borrowed money at 7 per cent, and lent it out in small sums at 12½ per cent, so that their net profits could not be more than £100 per annum, and under these circumstances they would not be able even to pay his salary, and he advised him to have nothing whatever to do with the society. On the 26th of December, Mr. Wood wrote to Mr. Wall, declining the appointment of secretary to the society, and requesting that the allotment of shares might be cancelled. To this Mr. Wall answered, on the 27th of December, by the following letter: "Dear Sir, I cannot cancel your shares after notice of allotment has been sent. Your shares were applied for conditionally that we appointed you, which we are prepared to do, and as the time expires to-morrow on which you agreed to pay them, you will please forward

check for the amount, when the warrants shall be forwarded you."

Mr. Wood then consulted his solicitors, Messrs. Frodsham & Nicholson, of Liverpool, who on the 29th of December, 1871, wrote to Mr. Wall, demanding that the allotment of shares should be immediately cancelled, in default of which they would hold the directors, manager, and secretary, responsible for all damages and expenses caused to Mr. Wood by their refusal. No answer was received to this letter, and Mr. Wood believed that the allotment had been duly cancelled until he received a letter on the 7th of December, 1872, with a notice from Mr. Slater, the liquidator, informing him that he was included in the list of contributories of the society, and a demand for payment to him within ten days of the sum of £600 in respect of the 120 shares so allotted improperly to him.

Mr. Wall, by his affidavit, after setting out the application by *Mr. Wood for the appointment of secretary, which he [239 said was made in answer to an advertisement by him, and not in consequence of an advertisement inserted by Mr. Wood, stated that when Mr. Wood examined the books of the society he expressed himself satisfied therewith, and he signed the application for shares without any condition being specified that it was to be subject to what he should hear from Mr. Hobson; that Mr. Wood had expressed his satisfaction at being appointed secretary, and had requested the letter of allotment and the agreement to be forwarded to him to sign; that he, Mr. Wall, being duly authorized to allot shares, had filled up the letter of allotment to Mr. Wood, and had sent it to him in the ordinary course of business. This evidence was confirmed by Mr. Clark, the manager of the company.

Mr. *Higgins*, Q.C., and Mr. *Dryden*, in support of the motion: This is a purely voluntary winding-up of the company, and is therefore not affected by the decisions in cases of winding-up under the direction of the court. We have three grounds of objection to the name of Mr. Wood being placed upon the list of contributories. In the first place, there was no application for shares which in the company was entitled to act. The application was entirely conditional upon Mr. Wood accepting the office of secretary. Secondly, we say that Mr. Wood repudiated the allotment of shares before his name was placed upon the register of shareholders; and, thirdly, we say that there was no binding allotment of shares; the allotment paper was merely filled up by the secretary, and this was done before there was time for any meeting of the directors to be held, or any formal allotment to be made. This case is not bound by the decision in *Oakes*

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v. *Turquand* ⁽¹⁾ because there has been no order made for winding up the company. All these transactions took place before the 27th of November, 1872, when the resolution was passed for the voluntary winding up of the company. We say, moreover, that Mr. Wood was induced by trickery and undue influence to sign the application for shares, and that the court must set the whole affair aside.

240] *Mr. Cotton, Q.C., and Mr. Ince, for the liquidator; The question upon this motion is one of fact, whether or not the appointment was made conditionally upon Mr. Wood being appointed secretary; but even if it were conditionally, we were ready to perform the condition. However, the evidence of Mr. Wood, which is entirely unsupported, is contradicted by Mr. Wall and the manager of the company. His subsequent repudiation of the shares does not affect the question, since the allotment was actually made, and we show by the evidence that the secretary, Mr. Wall, was duly authorized by the directors to fill up the allotment paper. This question is therefore concluded by the decision in *Oakes v. Turquand* ⁽¹⁾, before the house of lords; but, under any circumstances, it was the duty of Mr. Wood to take proceedings to have his name removed from the register. All that took place was that his solicitors wrote to the company upon the subject, but no further step was taken, and the liquidator, finding his name upon the register, was justified in placing him on the list of contributories.

SIR R. MALINS, V.C.: I not only do not disbelieve Mr. Wood's statement, but I believe every word he has sworn by his affidavit to be strictly correct, and upon that statement I think I am bound to disbelieve, and do disbelieve, as far as it is necessary for me to do so, the witnesses who have made affidavits on the other side. However, it is not necessary for me to refer to that, because the transactions plainly show that this young man has been imposed upon; and I am very sorry to find that the liquidator, who has only an official duty to perform, should have thought it any part of his duty to interfere to fix upon this young man liability on account of the fraud which has been committed upon him. Now, what are the transactions in this case? Here is a gentleman who has been in the navy; he has command of a few hundred pounds and wants employment. Whether he advertised for employment himself, or answered the advertisements of the society, does not matter; but they 241] offer to him a situation of £2 a week. *They issue an advertisement, not for the *bonâ fide* purpose of getting a secretary, but, as I believe, for the purpose of inducing some unwary person upon whom they could impose, to advance his capital under

⁽¹⁾ Law Rep. 2 H. L., 825.

the color of giving him employment. This gentleman, deceived by the letters or advertisements—I care not which—of this society, goes from Birkenhead to Leicester on the 18th of December, 1871. Of course it is part of the scheme to make his visit most agreeable to him, so he is met at the railway station by the secretary and manager; they take him to their house; he is hospitably entertained and invited to dinner; he is shown the books, of which he could form no sort of opinion as to whether they were true or false; and having had his dinner, he is again escorted by these people to the station on his return; but he swears (and I entirely believe what he says) that this Mr. Wall, the secretary, and Mr. Clark, the manager, did an act which is condemnatory enough of their conduct. Knowing that his sole object was to get employment in this concern, they pressed him on the same day to do that which on no account should they have allowed him to do, namely, to sign an application for 120 shares in this company, which involved the employment of £600. On that subject he says: “Mr. Wall and the manager detained me in conversation at the said office for a considerable time, with the design (as I now believe) of preventing my seeing Mr. Hobson; and, owing to their so detaining me, it was nearly six o'clock in the evening before I reached the office.” Be it borne to mind they knew he had a letter of introduction to Mr. Hobson; they knew that on Mr. Hobson's advice he intended to rely; they knew that Mr. Hobson was not accessible and not in Leicester at that time of day; and knowing that he had not an opportunity of seeing the only person who was to advise him, they did this: they accompanied him to Mr. Hobson's office to show him the way, and returned with him to the office of the society, when they produced a document which they pressed him to sign, and which he understood to be an agreement to take shares in the society to the amount of £600 if he became its secretary. His only object was to become secretary, and the very nature of the transaction shows that the application was conditional. At that time he was disposed to accept the situation if Mr. Hobson should advise him to do so; and believing, as he was told, that his signature to the document on that occasion would expedite [242] matters in the event of his deciding on taking the situation, and being much pressed by Mr. Wall and the manager so to do, he signed the document on the distinct condition and understanding with them that such document was not to be made use of or acted upon unless, after hearing from Mr. Hobson, he should accept the secretaryship, and that he would communicate his decision to Mr. Wall as soon as he had heard from Mr. Hobson. He then proceeded to the railway station, and returned to Birken-

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head the same night. Mr. Wall and the manager accompanied him to the railway station, and the last words he said to them were to the effect that he could not decide until he had heard from Mr. Hobson.

Then it appears that on the 20th he had a letter from Mr. Hobson, who came to the conclusion, on looking at the books (which was the only conclusion that he could possibly arrive at), that this society never could have any success, and that it could not possibly make more than a profit of £100 per annum, and therefore he advised the applicant to have nothing whatever to do with it. The next thing is that the secretary, who in this was guilty of a most improper act, first in obtaining this application for shares, knowing that it was to be upon the condition, not of their being willing to give him the secretaryship, but of his accepting, writes on the 19th a letter making an allotment to him of 120 shares; and this is the transaction upon which it is sought to fix upon him the liability to stand as a shareholder of this company. A correspondence is then carried on between the parties. On the 26th, Mr. Wood writes a letter declining the appointment, and asking that the allotment of shares may be cancelled. Of course that ought immediately to have been done; but the secretary writes on the next day: "I cannot cancel your shares after notice of allotment has been sent." That is a notice of allotment which never ought to have been sent. "Your shares were applied for conditionally that we appointed you, which we are prepared to do." That was not the condition. It was not the condition that they should appoint him as secretary, but that he should accept the secretaryship, which he never did. What is the proposal they make 243] then? They sent him a draft agreement, by which he *is to have £2 a week, and he is liable to be arbitrarily dismissed at any time they think fit after fourteen days' notice. So that, in consideration of his paying them the £600, a salary of £2 per week is secured to him for only two weeks; the shares are not cancelled, but he is never asked to pay a penny upon them, and then the official liquidator, finding his name upon the list, insists that there it is to stand, and that he is liable to pay the £600. The thing is a fraud and an imposition from beginning to end. I must say it is disgraceful to those who were engaged in it originally, and I cannot say that it is very creditable to any of those who now endeavor to force upon this young man a liability from transactions which commenced in fraud and ended in extortion. In my opinion his name must be erased from the list, and he must have the costs.

Mr. Higgins: We ask that the costs may be allowed as between solicitor and client under the 35th section of the act of

1862, which is to this effect: "The court may [upon an application to rectify the register] either refuse such application with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained." This was considered by your honor in *Pontifex's Case* (¹), where Mr. Pontifex, having been unjustifiably placed on the register of members, was allowed against the company all his costs of the proceedings in excess of those as between party and party, as well as all preliminary expenses incurred by him, by way of damages under sect. 35 of the Companies Act.

Mr. Ince: As regards the liquidator, it does not matter to him, of course, one way or the other; but he is bound to protect the interests of the other shareholders and of the creditors. *Langer's Case* (²) shows the obligation which the liquidator may incur on behalf of other contributories and the creditors; the head-note to that case is as follows: "When a person agrees to become a *member of the company, is placed upon the [244 register, and afterwards acts as a shareholder, he cannot resist being placed upon the list of contributories, whatever may have been the circumstances under which the shares were transferred or allotted to him. The transfer being bad as a deed would not affect the question of his liability, nor even dishonest conduct on the part of officers of the company."

Mr. Higgins: That was a compulsory winding up and this is a voluntary winding up, and Mr. Wood never did consent to become a shareholder.

Mr. Ince: That does not affect the question of costs. What I ask the court is, what the liquidator is to do with such a case before him, and whether it is quite fair, when the liquidator is brought here by the applicant, to mulct the other contributories and creditors if there are any.

THE VICE CHANCELLOR: *Langer's Case* (²) does not go to the question of costs. This is a case in which, in my opinion, the applicant should be completely indemnified in respect of these fraudulent transactions, and he cannot be completely indemnified without having his extra costs paid. As regards creditors, I have not heard that there are any creditors; and I am inclined to think it is an attempt made by the other shareholders to make the present applicant contribute. I shall give Mr. Wood his costs, as between solicitor and client, by way of damages to indemnify him against the consequences occasioned

(¹) 15 W. R., 955.

(²) 37 L. J. (Ch.), 292.

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by the extraordinary practices which have been adopted against him.

Solicitors for the applicant : Messrs. *Chester, Urquhart, & Co.*
Solicitors for the society : Messrs. *Howard & Co.*

[Law Reports, 15 Equity Cases, 247.]

V.C.B. Dec. 7, 1872.

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*WHITE v. WHITE.

[1872 W. 157.]

Rectification of Deed — Practice.

A deed was executed purporting (by mistake) to convey a moiety only of real estate, the intention of the parties having been to pass the whole. Infants were interested. Upon bill for rectification :

Held, that a conveyance of the other moiety by another deed was not necessary, and order made declaring that the deed was, in the particulars after specified, executed by mistake, that it was intended to pass the entirety, and that the deed ought to be rectified, ordering rectification by words and figures accordingly, and directing a copy of the order to be endorsed on the deed.

MOTION FOR DECREE. Prior to the date of the next stated indenture, John Bazley White the father was seized in fee simple in possession of a property called the Swauscombe Cement Works, in the parish of Swanscombe, in the county of Kent, subject to a term of twenty-one years from the 1st of January, 1853, which was vested in John Bazley White the younger, George Frederick White, and Robert Owen White. On the 22d of May, 1865, an indenture was executed whereby the lands and hereditaments specified in a schedule thereto were granted and confirmed by J. B. White the father, and (as to the premises comprised in the term for the purpose of merging the same in the freehold) were granted, assigned, and confirmed by J. B. White the younger, G. F. White, and R. O. White, to a trustee and his heirs, to the use and intent that J. B. White the father might thenceforth during his life receive a yearly rent-charge of £2700, to be chargeable upon and issuing out of the premises, and if he should die before the 31st of December, 1872, then that his executors, administrators, or assigns, might receive a yearly rent-charge of £1000 to that date, to be chargeable upon and issuing out of the premises ; and subject thereto, to the use of J. B. White the younger, G. F. White, and R. O. White, their heirs and assigns, absolutely, in equal shares as tenants in common. Amongst the items of properly scheduled to this deed was the following, numbered 3, "One undivided
248] moiety or half part or *share, or one equal moiety or half part or share, of and in all that piece or parcel of land situate and

being in the parish of Swanscombe in the county of Kent . . . containing by measurement 10A. 2R. 24P. . . known as the Swanscombe Cement Works." On the 20th of October, 1867, J. B. White the father died, having made a will, appointing J. B. White, G. F. White, and another person executors, and disposing of the £1000 rent-charge as part of the income of his residuary estate. On the 8th of June, 1872, this bill was filed by J. B. White, G. F. White, and R. O. White, against the executor (other than the two plaintiff executors) and the beneficiaries under the will, several of whom were infants, alleging that the common intention, agreement, understanding, and belief of J. B. White the father and of the plaintiffs were, that the deed should comprise the entirety of the property called the Swanscombe Cement Works; that upon the execution of the deed the plaintiffs were let by J. B. White the father into possession and receipt of the rents and profits of the entirety of the premises; that the rent-charges before and since the death of J. B. White the father had been duly paid; that in about April, 1872, the mistake was discovered; that of the persons beneficially interested under the will (all of whom had been made defendants) those who were competent to consent were willing that the indenture should be rectified; but that, under the circumstances, the deed could not be rectified except under and by the direction of the court. The bill then prayed that the indenture might be rectified by omitting from item 3 in the schedule the words referring to a moiety of the Swanscombe Cement Works, and by inserting proper words, so as clearly and effectually to pass the entirety. The prayer of the bill was supported by the affidavits of the plaintiffs and of the solicitor employed in the preparation of the deed, who explained how the mistake arose.

Mr. *Marten*, for the plaintiffs: In *Stock v. Vining* ⁽¹⁾ the master of the rolls ordered the deed itself to be rectified without a conveyance, and his lordship *authenticated the alteration by [249 signing his initials against the alteration. In *Squibb v. White* ⁽²⁾ the master of the rolls appears to have considered it sufficient to order the rectification, and to direct a copy of the order to be endorsed on the deed. It is submitted that the latter mode is sufficient, and is the proper practice.

Mr. *Rodwell*, for the defendants: It may be doubted whether a conveyance of the outstanding moiety is not necessary after the dictum of Lord Cottenham, C., in *Marquis of Exeter v. Marchioness of Exeter* ⁽³⁾. There, however, more property had passed than was intended, instead of less, as here.

(1) 25 Beav., 235.

(2) Set. on Dec. vol. 1, p. 498.

(3) 3 My. & Cr., 321, 326.

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SIR JAMES BACON, V.C. : In my opinion a declaration that the deed ought to be rectified, followed by an order that it be rectified accordingly, will be sufficient to pass the legal estate without a conveyance. If the parties desire it, I will put my initials to the alteration, as was done by the master of the rolls in *Stock v. Vining* (¹); but I do not consider it necessary, as, in my opinion, the order will be sufficient without more.

The following are minutes of the decree :

Declare that the indenture dated the 22d of May, 1865, in the bill of complaint mentioned was, in the particulars hereinafter specified, executed under mistake, and that the same indenture was intended to pass thereby the entirety of the property called the Swanscombe Cement Works; and

Declare that the same indenture ought to be rectified by omitting from the item 3 of the third schedule thereto the words referring to a moiety of the said property called the Swanscombe Cement Works, and by inserting proper words in the said schedule, so as clearly and effectually to pass the entirety of the said property called the Swanscombe Cement Works; and, therefore,

Order that the said item No. 3 of the said schedule to the said indenture be rectified by omitting therefrom the following words, that is to say, "One 250] *undivided moiety, or half part or share, or one equal moiety or half part or share of and in," and by inserting in the said item No. 3 of the said schedule, in lieu of the said words, the words "The entirety of" (and by making similar omissions and insertions throughout the description); and

Let a copy of this order be endorsed upon the said indenture.

Liberty to apply.

Solicitors for the plaintiffs and defendants : Messrs. *Thomas & Hollams*.

See Moak's *Van Santvoord's Pleadings*, 413.

[Law Reports, 15 Equity Cases, 257.]

V.C.B., Feb. 8, 1873.

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*HEATH V. CREALOCK.

[1870 H., 248.]

Practice—Absconding Defendant—Solicitor and Client—Privilege—Client's Address.

The court will not make an order upon a solicitor compelling him to disclose the address of his client (a defendant) who has absconded, and whom plaintiff seeks to serve with a *subpœna duces tecum* to compel his appearance at the hearing with documents material to the plaintiff's case.

THIS was a motion on behalf of the plaintiffs that Messrs. Clarke, Son, & Rawlins, solicitors of the defendant Wm. S. Crealock, might be ordered to disclose to the plaintiffs the present place of abode of the defendant, in order that the plaintiffs might serve the defendant with a writ of *subpœna duces tecum*, or such proceedings as might be necessary to compel him to appear

(¹) 25 Beav., 235.

at the hearing of the cause, to give evidence, and to bring with him certain documents in his possession; and that proper directions might be given to the clerks of records and writs, authorizing them to issue such writ or writs, or that an order might be made directing that service on Messrs. Clarke, Son, & Rawlins, of the said writ, or other proceedings, might be deemed good service on the said W. S. Crealock. The bill was filed against W. S. Crealock, a solicitor formerly carrying on business at Aberystwith, who was charged on his own admission with a very grave breach of trust in the appropriation of £3000. Before the bill was filed Crealock absconded, taking with him a mortgage deed and other documents relating to the trust. He had remained abroad ever since, but had appeared and defended the suit and put in a voluntary answer, at which time he was residing at Ostend. The plaintiffs considered it of importance that W. S. Crealock should be present at the hearing of the cause to answer questions as to, and to produce, certain securities referred to in his answer, and believed to be in his possession, and they had applied to his solicitors, Messrs. Clarke, Son, & Rawlins, for his address. Messrs. Clarke, Son, & Rawlins declined to give up the address of their *client, but [258 offered to consent on his behalf to an order for substituted service, or to send him a copy of the subpoena and urge him to return it with his acknowledgement thereon of having received it. It appeared that on the 19th of January, 1873, Crealock wrote to his solicitors stating that he was that day leaving his late abode and should not disclose to them his future residence, so that they might be unable to comply with any order such as was referred to if made. In future they might address any letter for him to Aberystwith (his former place of residence), and sooner or later it would probably reach him, though they must not count on an early reply, as it would be very uncertain when it came to hand. He expressly requested them not to disclose his address hitherto, or any other information respecting himself which he had confided to them as his solicitors. If the plaintiff's solicitors were so anxious to subpoena him personally, on their undertaking to take no other advantage of him, he would "appoint a place at Antwerp to meet any one from your office whom they may select to serve me, on their sending me £10 to cover my expenses to and from that port," or his solicitors might consent to any substituted service in lieu of personal service.

Mr. *Bedwell*, in support of the motion: We ask to have an opportunity of serving the defendant personally with such process as we may be advised for the purposes of bringing him before the court at the hearing, as substituted service of a *subpœna ad*

testificandum will not be ordered: *Spicer v. Dawson* ⁽¹⁾. No question of professional confidence is here involved. A solicitor is not privileged to conceal his client's address; the privilege, if privilege there be, is that of the client and not of the solicitor, and a defendant who has appeared to and defended a suit has no privilege, under such circumstances as those of this case, to conceal his address, and thus baffle the court. That a solicitor is not at liberty, in consequence of any privilege, directly or indirectly to conceal any fact which will enable the court to discover the residence of its ward is settled by *Ramsbotham v. Senior* ⁽²⁾; *Burton v. Earl of Darnley* ⁽³⁾; and this rule will, it is 259] *submitted, apply to the case of any defendant concealing his address.

Mr. *Locock Webb*, for the defendant, was not called on.

SIR JAMES BACON, V.C.: There is no evidence that the solicitors, or any one else, know the address of this defendant, and if they did there would be no obligation whatever on them to disclose it. The cases which have been cited, *Ramsbotham v. Senior* ⁽²⁾ and *Burton v. Earl of Darnley* ⁽³⁾, have no application, as they both relate to the concealment of wards of court, and in all such cases a solicitor is bound to give to the court every information which may lead to the discovery of their place of abode. I can find no precedent for making such an order as is asked, and I must refuse the motion with costs.

Solicitors: Messrs. *Budd & Son*; Messrs. *Clarke, Son & Rawlins*.

⁽¹⁾ 22 Beav., 282.

⁽²⁾ Law Rep., 8 Eq., 575.

⁽³⁾ Law Rep., 8 Eq., 576, n.

When the residence of the plaintiff is not known to the defendant and it is necessary for his protection that it should be disclosed his attorney may be compelled to disclose it and to give the plaintiff's occupation. *Johnson v. Bizby*, 5 Barn. and Ald., 540, 1 Dowl. and Ryl., 174; *Ninety-nine Plaintiffs v. Vanderbilt*, 1 Abb., Prac. Rep., 193; *Worten v. Smith*, 6 J. B. Moore, 110; *McRoeman v. Patrick*, 4 Howard's Miss. Rep., 533; *West v. Houston*, 3 Harrington (N. J.).

15. See also, *Evans v. Jones*, Cases Temp. Hardw., 179.

And if no plaintiff can be found the attorney may be compelled to pay the costs. *Gynn v. Kirby*, 1 Strange, 402.

Although the information may be refused in an action *qui tam*. *Braceby v. Dalton*, 2 Strange, 705.

Proceedings may be stayed until the plaintiff can be found. *Short v. King*, 2 Strange, 681.

If a defendant plead non joinder of other persons liable with him he may be compelled to give their residences and additions. *Taylor v. Harris*, 4 Barn. and Ald., 93.

[Law Reports, 15 Equity Cases, 260.]

V.C.B. Feb. 8, 1873.

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*INMAN v. INMAN.

[1872 L. 72.]

Infant — Voidable Transaction — Priority.

An infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, and executed a statutory declaration stat-

ing (untrue) that he was then of full age. After attaining twenty-one he mortgaged his interest in the fund for an amount exceeding what was ultimately available without disclosing the fact of the prior charge :

Held, that the charge given by the infant during his infancy and incapacity to contract was avoided by the subsequent mortgage executed by him when of full age and capable of contracting, to a mortgagee without notice.

ADJOURNED SUMMONS on behalf of the plaintiffs C. W. Inman and Edward Flower that the sum of £316 9s. 3d. standing in court to the credit of this cause to "the account of C. W. Inman and his incumbrancers," be paid to the applicant Edward Flower in part discharged of a sum of £400 and interest owing to him by *the applicant C. W. Inman, and secured by a [261 mortgage dated the 15th of March, 1872. The application was opposed by Robert Morris, who claimed under a prior charge given by the plaintiff on the 18th of March, 1870, but it appeared that at the time when such charge was given the plaintiff was an infant, though he concealed the fact from Morris. Upon the death of his father, the plaintiff C. W. Inman became absolutely entitled under the will of Charles Inman, the testator in the cause, to one-fifth share of two legacies of £8000 and £2000.

It appeared that in March, 1870, Morris, a bill discounter and money lender in Waterloo Place, was applied to by a Mr. Simpson to discount for the plaintiff a promissory note for £125. Being informed that the plaintiff was entitled to the above-mentioned share payable on the death of his father, then aged fifty-two, and that the plaintiff had attained twenty-one, Morris consented to discount the promissory note upon having a memorandum of charge given to him by the plaintiff to secure payment of the note and interest, and the usual statutory declaration. The plaintiff, who was then under age, and a student at St. Bartholomew's Hospital, gave his promissory note for £125, with interest at 1s. 3d. in the pound per month, and gave a memorandum of charge upon all his estate, share, and interest under the will of the testator for securing to Morris payment of the note and interest. The memorandum was accompanied by a statutory declaration by plaintiff that he was of the age of twenty-one years and upwards, having been born at Melbourne, in Australia, on the 21st of June, 1848; that he was entitled under the will of the testator, as one of the five children of Robert Inman, to the share in question payable at the death of his father; and that he had not charged, incumbered, or prejudicially affected his interests under such will. Upon receiving these documents, which bore date the 18th of March, 1870, from Allen, his solicitor, who had prepared them, Morris drew a check for £106 5s., the agreed consideration for the said promissory note, and, according to his affidavit, "the said Mr. Allen accounted to the said plaintiff for the same, as I have

been informed and believe." On the 1st of June, 1870, Morris 262] discounted for the *plaintiff another promissory note for £150, and took a memorandum of further charge from the plaintiff. The two promissory notes for £125 and £150, with interest, not having been paid, Morris on the 10th of December, 1870, gave notice to the defendants, the executors of the will of Charles Inman, of his charges, and repeated this notice on the 12th of December, 1871, and the 20th of January, 1872.

On the 5th of October, 1872, notice was given to Morris that, in consequence of his claim upon the executors the sum of £316 19s. 3d., the balance of the plaintiff's share (the greater part of which had been paid to him on his father's death), had been paid into court by them to an account entitled "The account of Mr. C. W. Inman and his incumbrancers," and that application for payment would be made by Flower, an incumbrancer by mortgage dated the 15th of March, 1872.

The plaintiff attained twenty-one on the 21st of June, 1871. In his affidavit Morris stated that at the time he discounted the promissory notes he did not know, nor had he any reason to suspect, that the plaintiff was under age; on the contrary, assuming that the statement in the statutory declaration as to the age of the plaintiff was true, he believed that he had attained his majority, and he advanced his money on the faith of the truth of the statement in the statutory declaration. He had never seen the plaintiff. The applicant Flower stated in his affidavit that when he advanced his money to the plaintiff and took his security he had no notice or knowledge of any charge or security given by the plaintiff, and was wholly ignorant of any prior transactions between the plaintiff and Morris. He also stated that on the 14th of February, 1872, he wrote to C. Inman, the acting executor and trustee, and also to W. Inman, one of the other two trustees, to inquire whether they had notice of any incumbrance by C. W. Inman affecting his interest in the funds. No answer was received, and the applicant wrote again, and in a third letter, of the 29th of February, 1872, he gave notice that he should advance the money in a week's time unless he heard in the meantime from the trustees (to whom he should look to make good any loss) that the interest had been incumbered.

263] *Not receiving any answer from the trustees, Flower advanced £400 to C. W. Inman on the security of a mortgage dated the 15th of March, 1872, after having satisfied himself, by inspecting the baptismal register, that C. W. Inman had attained twenty-one.

Mr. *Nalder* (Mr. *Kay*, Q.C., with him), in support of the summons: The charge of Morris, having been taken from the

plaintiff while he was an infant, cannot prevail against the mortgage to Flower executed when he was of full age. In the case of an infant or married woman, fraud does not prevent the incapacity to contract being a defense to an action: *Barllett v. Wells* ⁽¹⁾; *De Roo v. Foster* ⁽²⁾.

Mr. *Freeman*, and Mr. *Fullerton*, for *Morris*: If the infant practices fraud, he is liable for the consequences. Having obtained the money upon the faith of his solemn declaration that he was of full age, he has rendered himself liable in equity (though an infant at the time) for the debt so contracted: *Cory v. Gericken* ⁽³⁾; *Lord Teynham v. Webb* ⁽⁴⁾; *Allen v. Allen* ⁽⁵⁾; *Slator v. Brady* ⁽⁶⁾. The law of England, whilst it protects the imbecility of infants, still keeps in view that respect which is due to the fair claims and interests of others, and will not allow that which, in the language of Lord Mansfield in *Zouch v. Parsons* ⁽⁷⁾, was intended as a shield and not as a sword to be turned into an offensive weapon of fraud and injustice, and therefore an infant consant of a fraud shall be as much bound as an adult: *Fonblanque's Equity* ⁽⁸⁾; *Story's Equity Jurisprudence* ⁽⁹⁾; *Co. Litt.* ⁽¹⁰⁾; *Comyn's Dig. Infant, E.* The privilege of infancy is a legal privilege. "On the one hand, it cannot be used by infants for the purposes of fraud; on the other, it cannot, I think, be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences *which attach to it": *Nelson v. Stocker* ⁽¹¹⁾. [264] In this case Mr. *Morris* has sworn distinctly that he did not know that plaintiff was an infant, and advanced his money on the faith of the statutory declaration that he was of full age. An infant may render himself liable for an independent tort. *Burnard v. Haggis* ⁽¹²⁾. Moreover, in this case the contract with *Morris* was one which was voidable and not void. Being voidable at his election when he comes of age, he must, in order to escape from liability, then do some act showing his intention to repudiate it, and it has been held that a mere plea of infancy without an averment that he repudiates the contract is insufficient: *Leeds and Thirsk Railway Company v. Fearnley* ⁽¹³⁾; *Birkenhead, &c. Railway Company v. Pilcher* ⁽¹⁴⁾; *Dublin and Wicklow Railway Company v. Black* ⁽¹⁵⁾. If he does not himself elect to avoid it (and in this case the contract with *Morris* is impeached

⁽¹⁾ 31 L. J. (Q.B.), 57.

⁽²⁾ 12 C. B. (N.S.), 272.

⁽³⁾ 2 Madd., 40.

⁽⁴⁾ 3 Ves. Sen., 198.

⁽⁵⁾ 2 D. & War., 307.

⁽⁶⁾ 14 Ir. Com. L. Rep., 61.

⁽⁷⁾ 3 Burr., 1804.

⁽⁸⁾ Book 1, chap. ii, § 4.

⁽⁹⁾ § 240.

⁽¹⁰⁾ Page 172, a.

⁽¹¹⁾ 28 L. J. (Ch.), 760-4.

⁽¹²⁾ 33 L. J. (C.P.), 189.

⁽¹³⁾ 4 Ex., 26.

⁽¹⁴⁾ 5 Ex., 114, 121.

⁽¹⁵⁾ 8 Ex., 181.

by a subsequent incumbrancer), no one else can do so for him; a third party, a mere stranger, has no right to say that the infant may not make what contract he pleases: *Douglas v. Watson* ⁽¹⁾; *Holt v. Ward* ⁽²⁾; *Forrester's Case* ⁽³⁾; *Wittingham's Case* ⁽⁴⁾. They also cited *Ware v. Lord Egmont* ⁽⁵⁾; *Wrout v. Dawes* ⁽⁶⁾.

SIR JAMES BACON, V.C.: If I were to yield to the very discursive argument that has been addressed to me, I should be laying down a rule which persons in Mr. Morris's condition would very readily avail themselves of. I have nothing to do with a great deal of what has been read from text books, beginning with Coke on Littleton, and coming down to a very recent time, because the principles are beyond all question. What I have to deal with is the case of a mortgage to Mr. Flower, perfectly valid in all respects, made by an adult man, made after inquiry had been made of the trustees, and satisfactorily answered by them. The question is whether that is to have its full 265] force and effect, or whether it is to be *supplanted and superseded by what is called a charge created by this man at a time when he had not attained his age of twenty-one. I am told he cannot avail himself of his fraud; but it is not he who is seeking to avail himself of his fraud. I am told it was not void in the beginning, but voidable. If it were voidable can there be any more entire avoidance of it than the assignment made in favor of Mr. Flower? Mr. Flower's evidence is clear and distinct, and open to no kind of impeachment; and unless I am to hold that as against Mr. Flower, in whom the interest of Mr. Inman is now vested by virtue of the instrument, that interest is taken away from him by virtue of that contract, which, when Mr. Inman was incapable of contracting, he entered into with Mr. Morris, nothing can be more clear than that Mr. Flower is entitled to the benefit of his security, and to payment out of the fund now standing in court. I have heard nothing which can in the slightest degree affect the principle upon which such matters are regulated. If I were to inquire into what is called faults on both sides, I should be compelled to say that I can find no fault on the part of Mr. Flower. If I look at Mr. Morris's evidence, and if it were necessary to inquire into it, I cannot say that it inspires me with entire confidence; I cannot say that the payment is proved to have been made in the distinct manner in which it might have been. It is not necessary however, to inquire into that. By a transaction, which if it were not void at first, was avoided by the subsequent mortgage, an infant con-

⁽¹⁾ 17 C. B., 685, 691.

⁽²⁾ 2 Str., 938.

⁽³⁾ Sid., 41.

⁽⁴⁾ 8 Rep., 42 b.

⁽⁵⁾ 18 Jur., 371.

⁽⁶⁾ 4 Jur. (N.S.), 396, 398.

tracts to make available a certain equitable interest which he then possessed, and at a later period, when he was competent to contract, he does contract with Mr. Flower, and does make to him an assignment and transfer of all of his interest. In my opinion the case is clear beyond the possibility of doubt, and although there is no disputing the authority of the cases which have been referred to, I have not been able to perceive the application of those cases to the present. There must be an order for payment of the money in court to Flower, and the costs occasioned by the summons being adjourned into court must be paid by Morris.

Solicitors: Messrs. *Flower & Nussey*; *E. G. Lawrence*.

[Law Reports, 15 Equity Cases, 209.]

V.C.W., Dec. 21, 1872.

*DAVEY V. WIETLISBACH.

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[1872 D. 183.]

Declaration of Rights of Parties—Direction for Sale of Premises—Further Consideration reserved—Costs.

Where infant plaintiffs prayed for a declaration that premises were divisible amongst them and a defendant, and that the costs of the suit might be taxed, and the plaintiffs' costs declared to be a charge on their shares; for a partition, or sale, and, after payment of the costs, for a division of the proceeds, the court made a declaration as to the rights of the parties, and directed a sale, but declined to make any order as to the costs until the further consideration of the cause.

Form of decree in *Young v. Young* ⁽¹⁾ and *France v. France* ⁽²⁾ not adopted.

THREE infants, by their next friend, filed the bill in this cause; and they prayed for a declaration that a certain messuage and premises in the bill mentioned were divisible amongst them and the second named defendant in equal fourths; they also prayed that the costs of themselves and the defendants in the suit might be taxed, and that the costs of the plaintiffs might be declared to be a charge upon their shares in the premises; that a partition of the premises might be made amongst the plaintiffs and the second named defendant; or that the premises might be sold, and the proceeds, after the payment of the costs, divided amongst them; and for consequential relief.

Mr. *Bury*, for the plaintiffs, stated the facts, and asked for an order similar to that made in the case of *Young v. Young* ⁽¹⁾, which was followed in the case of *France v. France* ⁽²⁾.

Mr. *Rodwell*, for the defendants.

SIR JOHN WICKENS, V.C.: I will make a declaration that the messuage and premises are divisible amongst the three plaintiff-

⁽¹⁾ Law Rep., 13 Eq., 175, n.

⁽²⁾ Law Rep., 13 Eq., 173.

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270] iffs and the second named *defendant, and direct a sale of the property; but I must decline to make any order at present as to the costs. Further consideration must be reserved, and there will be liberty to apply.

Solicitor for the plaintiffs: Mr. W. S. Page.

Solicitor for the defendants: Mr. Robinson.

[Law Reports, 15 Equity Cases, 270.]

V.C.W., Dec. 16, 1872.

In re WILLIAMS' ESTATE. WILLIAMS v. WILLIAMS.

[1871 W. 149.]

Administration of Assets—Action against Legal Personal Representative—32 & 33 Vict. c. 46—Specialty and Simple Contract Debts—Judgment Creditor—Priority.

By the statute 32 & 33 Vict. c. 46, the distinction between specialty and simple contract debts in the administration of assets of deceased persons is abolished, but a creditor who first takes legal proceedings against the legal personal representative, and obtains judgment, is, though it be not registered, entitled to be paid his debt in full in priority over all other creditors.

Jennings v. Rigby (1) followed.

ADJOURNED SUMMONS. The suit was instituted by a summons for the administration of the personal estate of James Williams, who died intestate after the passing of 32 & 33 Vict. c. 46, one of the simple contract creditors having obtained judgment against the administratrix for debt due to him by the intestate. On the 27th of June, 1871, an order was made on the summons for administration, and another order was immediately afterwards made restraining the judgment creditor, who had obtained judgment on the 23d of June, 1871, from further proceeding with his action. All the personal estate (£832 6s. 4d. consols) had been paid into court, but it was insufficient for the payment of all the debts and the costs of the suit. Some of the creditors were specialty creditors under a mortgage deed executed by the 271] intestate. *The creditor did not register his judgment at the Common Pleas Office, but claimed priority over the other creditors. The chief clerk had not allowed or disallowed the claim, but had simply certified the amounts of all the debts.

Mr. Morgan, Q.C., and Mr. Whitehorne, for the plaintiff: The question is, whether this judgment creditor has a right to be paid in full in priority to the other creditors, or whether the statute of 1869 (32 & 33 Vict. c. 46), which was passed for the purpose of abolishing the distinction as to priority of payment which then existed between the specialty and simple contract debts of deceased persons, has taken away that right. Prior to

(1) 33 Beav., 198.

the passing of the statute 4 & 5 Will. & M. c. 20, an executor was liable upon any judgment, even if he had no notice of it. To remedy the hardships which executors sometimes suffered that statute was passed. The object of it is fully explained in the cases of *Hickey v. Hayter* ⁽¹⁾ and *Steel v. Rorke* ⁽²⁾. It was intended by that statute to settle all questions between creditors *inter se*. By the 23 & 24 Vict. c. 38, s. 3, it was enacted that no judgment which had not been entered as therein mentioned should have any preference against, *inter alios*, administrators in their administration of intestates' estates; and by sect. 4 it was enacted that no judgment which had been registered under the provisions contained in the 2 & 3 Vict. c. 11, as amended by the 18 & 19 Vict. c. 15, should have any preference against, *inter alios*, administrators in their administration of intestates' effects, unless at the death of the intestate five years should not have elapsed from the date of the entry, or from the only or last re-entry thereof. The language of the statute clearly extends to all judgments, including those of county courts: *Re Turner* ⁽³⁾; *Williams on Executors* ⁽⁴⁾. The statute of 1869 abolished the distinction between specialty and simple contract debts in the administration of assets in this court; and though the act is silent as to judgments, yet it is submitted that the language of it applies to all creditors, and has put them upon the same footing: *Landon v. Ferguson* ⁽⁵⁾; *Walter v. Turner* ⁽⁶⁾. [272 In *Dolland v. Johnson* ⁽⁷⁾ it was held, but with great reluctance, that a registered judgment obtained against the representative of a deceased person had priority, but in this case the judgment has not been registered. [The VICE CHANCELLOR: But for the Act 32 & 33 Vict. c. 46 this case would be clear. There is the case of *Jennings v. Rigby* ⁽⁸⁾, which is against you, for it was there held that judgments against executors need not be registered in order to retain their priority.] Though the judgment creditor may contend that he is entitled to set that case off against *Re Turner* ⁽⁹⁾; yet it is submitted that the court is not bound, looking at the reasoning, to follow that decision. If the act of 1869 had not been passed a specialty creditor would clearly have had precedence over this judgment creditor. It could not have been intended indirectly to take away this priority, as will be the case if the argument on the other side should succeed; for the object of the act was not to benefit judgment creditors, and give them a position above specialty

⁽¹⁾ 6 T. R., 384-387.

⁽²⁾ 1 B. & P., 307.

⁽³⁾ 33 L. J. (Ch.), 232.

⁽⁴⁾ 6th Ed. vol. ii, p. 935.

⁽⁵⁾ 3 Russ., 349.

⁽⁶⁾ 9 L. T. (N.S.), 756.

⁽⁷⁾ 2 Sm. & Giff., 301.

⁽⁸⁾ 38 Beav., 198.

⁽⁹⁾ 33 L. J. (Ch.), 232.

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creditors, but to benefit simple contract creditors; and certainly this is not a case in which the court will favor the judgment creditor, who by a mere slip on the part of the plaintiff has been enabled to obtain this alleged priority, but will distribute the assets of this intestate equally amongst his specialty, judgment, and simple contract creditors.

Mr. *Byrne*, for the defendant.

Mr. *T. A. Roberts*, for the judgment creditor, was not called upon, but he mentioned the case of *Gaunt v. Taylor* ⁽¹⁾, upon which the decision in *Jennings v. Rigby* was founded.

SIR JOHN WICKENS, V.C.: It seems to me that the case of *Jennings v. Rigby* is an authority conclusive upon me, and binds me to hold that in the year 1863 an unregistered judgment against an executor had priority in the administration of assets 273] over the debts of all other creditors *having debts of equal rank with that for which judgment was recovered. But it has been argued that the law has been altered by the statute 32 & 33 Vict. c. 46, and it has been pointed out that if that is not so, a judgment against an executor for a simple contract debt will obtain indirectly priority over specialty debts. That may be an unexpected and unintended consequence of the statute, but it appears to me to be an unavoidable one. The distinction between specialty and simple contract debts is abolished. It was abolished and did not exist when the intestate in this case died; but I can find nothing in the statute to take away that reward for diligence which a creditor is supposed to earn by being first to take proceedings, after the death of the debtor, against the executor, which gives him priority, if his proceedings ripen into a judgment, over all creditors of equal degree, even if they obtain judgment the next day; in other words, I do not think the legal effect of the proceedings taken after the intestate's death by this creditor was intended to be nullified or altered by the statute, which simply, and for certain purposes, and to a certain extent, made the mode in which the debt was contracted by the intestate immaterial. This judgment creditor must be paid in full in priority and with costs, and the costs of all the other parties upon this summons must be provided for out of the estate.

Solicitors for the plaintiff: Messrs. *Lewis, Munns, & Longden*.

Solicitor for the defendant: Mr. *Edmund Byrne*, agent for Mr. *R. D. Williams, Carnarvon*.

Solicitors for the judgment creditor: Messrs. *Bloxam, Ellison & Bloxam*.

(1) 3 Man. & G., 886; 3 Scott, N. R., 700.

[Law Reports, 15 Equity Cases, 279.]

L.J.J., for V.C.W. Feb. 20, 1873.

*GRIFFITHS v. JONES.

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[1871 G. 143.]

Vendor and Purchaser—Sale by Court—Valuation of Timber—Mistake—Opening Biddings.

At a sale of an estate by auction under the direction of the court, J. E. having previously been informed of the value of the timber, purchased lot 2, and agreed to take the timber at the price named by the auctioneer. The chief clerk confirmed the sale and filed his certificate. It was subsequently discovered that the value of the timber on a portion of the lot had been, by the mistake of the auctioneer, omitted:

Held, on summons by the vendors, that the purchaser was entitled to hold the property without submitting to a valuation of the timber.

THIS was an adjourned summons in a creditor's suit. The application was on behalf of the defendants, vendors, and it was in effect for the purpose of compelling John Evans, the purchaser of lot 2, part of an estate situate in the county of Flint, and sold under the direction of the court, to pay into court a sum of money, in addition to the purchase-money and the interest thereon, the value of the timber on the said lot, such value to be ascertained by valuation. The ground of the application was that a large portion of the timber was, by mistake, omitted in the valuation upon which the amount named by the auctioneer at the sale as the value of such timber was founded. The evidence on the part of the vendors showed that the timber on 63A. 13P. *of lot 2 had been omitted from the valuation of the timber on the lot, which at the time of sale on the 15th of August, 1872, the auctioneer stated to be £1620. John Evans purchased the lot for £11,000, and he said he would take the timber at the price named (£1620). On the part of the purchaser the evidence, in effect, was that his solicitors asked the vendors' solicitors, a week before the sale, what the valuation of the timber on the lot was, and were told that it would be divulged only at the sale, and that the purchaser would have the option of taking it at the vendors' price or by valuation in the usual way; that the purchaser and a friend went over the property and roughly estimated the value of the timber; that the purchaser on hearing, prior to the sale, the amount of the valuation of the timber, gave a larger sum than he had intended to give for the property; and that £12,620 was the full value of the lot with the timber. John Evans was the purchaser of other lots of the same estate, and took the timber on all of them at the valuation declared at the sale, though in some instances he was advised it was excessive. The chief clerk confirmed the

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sale, and his certificate was filed long before these proceedings were taken.

Mr. *Greene*, Q.C., and Mr. *Millar*, for the vendors, contended that upon the evidence there ought to be a fresh valuation of the timber.

Mr. *W. C. Hurvey*, for a subsequent mortgagee, supported that view.

Mr. *Morgan*, Q.C., and Mr. *A. Thomson*, for the purchaser, referred to the cases of *Morice v. Bishop of Durham* (¹), *In re Curlew's Estate* (²), and *Guest v. Smythe* (³); and contended that this was an application analogous to the old practice of opening the biddings, which had been abrogated by statute 30 & 31 Vict. c. 48. No fraud was imputed to the purchaser. The application was founded upon an alleged mistake, but there had been no mistake at all; even if there had been the court would not rescind the purchase merely on the ground that the vendors [281] had *made a mistake by their own agent, the auctioneer. There had been no surprise upon the vendors. They had had plenty of time to make up their minds as to the amount of the valuation of the timber and of the property. The certificate had become absolute before any proceedings were taken, and for these reasons the summons ought to be dismissed.

Mr. *Kekewich*, for the first mortgagee, who wished, if a valuation was not ordered, that the contract should stand as it was.

Mr. *Greene*, in reply, submitted that the argument as to the opening of the biddings had no application to this case. The evidence showed that the mistake was a serious one, and that the purchaser had a full opportunity of knowing of it; but whether he did know of it or not, he could not be allowed to hold the property without a valuation of the timber, which had been omitted by mistake. All that he could properly claim was to have the purchase rescinded.

SIR W. M. JAMES, L.J.: I am of opinion that the relief sought upon this summons cannot be granted. It may be that the agent of the vendors made a mistake as to the amount of the value of the timber on this lot, but it would be very inconvenient if a contract made between vendor and purchaser could, merely on the ground of some mistake by an agent, be set aside. Suppose the purchaser had made a mistake in his valuation of the estate, could I have granted him relief? If I could not do so in that case, why should I do so in this? The lot was sold for £11,000 after the value of the timber was declared, and the purchaser elected to take the timber at the price named, and not to have a valuation. There has been no fraud and no misconduct on the part of the purchaser; and the mistake, if any, was through

(¹) 11 Ves., 57.

(²) 26 Beav., 187.

(³) Law Rep., 5 Ch., 551.

neglect on the part of the vendors; and it is now quite clear that biddings cannot be opened except for fraud. I must hold that the contract is binding, and dismiss the summons with costs.

Solicitors: Messrs. *Barnard & Harris*; Messrs. *Ashurst, Morris, & Co.* Messrs. *Frankish & Buchanan*; and Messrs. *Dawes & Son*.

[Law Reports, 15 Equity Cases, 282.]

L.J.J. for V.C.W., Feb. 25, 1873.

*CROZIER V. CROZIER.

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[1872 C. 119.]

Will — Absolute Gift — Life Estate not implied.

Gift by a testator of all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, E. C. and after her death, to be equally divided to the children, should there be any; he also appointed his wife sole executrix. There were no children:

Held, that the wife was absolutely entitled.

SPECIAL CASE. R. W. Crozier, a colonel in the Indian army, by his will, dated the 6th of March, 1862, made the following disposition: "I give and bequeath to my nephew and godson, B. R. Crozier, the sum of £200. I also give and bequeath to R. Davis and A. Wood, brother and sister of my wife, each £100. All the residue of my estate and effects, both real and personal, whatsoever and wheresoever, and of what nature and quality soever, I give, devise, and bequeath the same to my wife, Emily Crozier, and after her death, to be equally divided to the children, should there be any. I hereby appoint her sole executrix of this my will."

The testator died on the 12th of August, 1871, having had one child only, who was born after the date of the will, but who predeceased the testator. The will was proved by the executrix. A question having been raised as to the interest taken by the executrix under the will, this case was filed, which requested the opinion of the court whether the executrix took an absolute interest or only a life interest in the real and personal estate of the testator, or in any and what part thereof.

Mr. *Dickinson*, Q.C., and Mr. *Coll*, for the plaintiff: There are two well-settled rules of this court for construing wills: First, that where there are words conferring an absolute gift, there must be words equally strong and clear to cut it down: Secondly, that where there is a gift over on the happening of an event, the actual event must happen before the gift over can take effect. Here the gift to the executrix is absolute, and is [283 only to be cut down on an event which has not happened. It follows that the executrix is entitled absolutely.

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Mr. *Karslake*, Q.C., and Mr. *Maidlow*, for the next of kin: The words of the gift imply that the testator intended only to give a life estate to the executrix. An intention apparent on the will that the legatee should have a life estate only, is sufficient to cut down the gift, however strong the words of gift may be: *Joslin v. Hammond* ⁽¹⁾; *In re Graham's Will* ⁽²⁾ *Waters v. Waters* ⁽³⁾.

Mr. *Lindley*, Q.C., for the heir-at-law.

SIR W. M. JAMES, L. J.: I must take the whole of the will together, and not one part separately. This case bears no resemblance to *Waters v. Waters* where the testator interposed trustees. It is more like the case of *In re Graham's Will*. The testator in this case gives the whole property directly to his wife without the interposition of trustees. It is a direct and absolute gift to her. Then he says, if there should be children the property is to go to them after their mother's death. It is perfectly clear he did not mean to die intestate, but if the widow only takes a life estate there is an intestacy. I am of opinion that the widow takes absolutely, and the question must be answered accordingly. The costs to come out of the estate.

Solicitor for all parties: Mr. *R. B. Wheatley*.

[Law Reports, 15 Equity Cases, 284.]

L.J.J. for V.C.W. Feb. 20, 1873.

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*In re CLOUGH'S ESTATE.

Leases and Sales of Settled Estates Act—Person of unsound mind not so found by Inquisition—Order made, under s. 36 of Act, appointing a Guardian—Sale of Estate by the Court—Objection to Title by Purchaser allowed.

On a petition presented under the Leases and Sales of Settled Estates Act, an order was made for the sale of an estate to which A B, a person of unsound mind, but not found by inquisition, was entitled for life in remainder. A B's brother had been previously appointed, under the 36th section of the act, the guardian of A B and of certain infants for the purpose of consenting on their behalves to the application, and he was to be at liberty on behalf of the infants to consent. The order for the sale was made upon hearing counsel for A B by his guardian, and the guardian by his counsel consenting.

The purchaser objected to the title on the ground that only a committee properly appointed could consent on behalf of A B.

Held, that the objection was well founded; and a summons taken out by the vendors to compel the payment of the balance of the purchase money, interest, and the costs, dismissed.

In re Venner's Settled Estates ^(*) considered.

THIS was an adjourned summons entitled in the matter of James Henry Clough's *Plas Ashpool Estate*, and of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120). James Henry Clough, who was after the life estate of Catherine Clough

⁽¹⁾ 3 My. & K., 110.

⁽²⁾ 33 Beav., 479.

⁽³⁾ 26 L. J. (Ch.), 624.

^(*) Law Rep., 6 Eq., 249.

(since deceased) entitled in fee, by his will devised this estate to trustees upon trusts for his wife (since deceased) for life, with remainder for his daughter (his heiress at law) for life, with remainder, in effect, for the use of his eldest grandson, Thomas Parr Williams-Ellis for life, with remainder for his sons successively in tail, with remainders over. The testator died in 1848. Thomas P. Williams-Ellis, now the tenant for life in remainder, was at the time the petition after mentioned was presented, and indeed had been since February, 1870, a person of unsound mind, though not so found by inquisition. He had five sons and two daughters, all infants. A petition entitled as above mentioned was presented on the 12th of July, 1871. It set forth all the facts, and, *inter alia*, alleged that it would be for the benefit of the parties beneficially interested in this estate that it should be sold and the proceeds applied in payment of [285 the incumbrances, and it concluded with a prayer to that effect, and that the surplus (if any) should be invested in consols.

On the 9th of July, 1872, John Clough Williams-Ellis was appointed guardian of his brother Thomas P. Williams-Ellis and of certain infants, "for the purpose of consenting on their behalfs" to the application. The order concluded thus: "And the said John Clough Williams-Ellis is to be at liberty, on behalf of the said infants, to consent to the said application." And on the 11th of July, 1872, an order, upon hearing counsel for, amongst others, Thomas P. Williams-Ellis, by his guardian appointed by the court, as above mentioned, and the guardian by his counsel consenting, was made whereby there were ordered and directed certain accounts and inquiries and a sale of the estate subject to the provisions and restrictions of the act, and the proceeds to be paid into court. The estate was, on the 11th of October, 1872, sold by auction under the direction of the court, and Peter Anderton was by the chief clerk, on the 31st of October, 1872, certified to be the purchaser of the estate for the sum of £26,500. The purchaser, who had received, on the 22d of November, 1872, from the vendors an abstract of title, objected to the title on the ground that only a committee properly appointed could consent on behalf of Thomas P. Williams-Ellis, and this was a summons on the part of the vendors asking that he might be ordered to pay the balance of the purchase moneys; a sum of £169 17s. 9d. for interest thereon; and the costs. The question was, whether the consent to the order for sale by the guardian appointed by the court of Thomas P. Williams-Ellis was binding upon Thomas P. Williams-Ellis as tenant for life in remainder, and sufficient to give validity as regarded him and the other persons interested in the estate to that order.

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In re Clough's Estate.

L.J.J. for V.C.W.

Mr. *Morgan*, Q. C., and Mr. A. *Thomson*, for the vendors: The order for sale was made under the provisions of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120). The 36th section of that act is, that all powers given by the act, and all applications, to the court under it, and consents to such applications may be exercised, made, or given by guardians on behalf of the infants, and by committees on behalf of lunatics; 286] and there is *a proviso that in the cases of infant or lunatic tenants in tail no application to the court or consent to any application may be made or given by any guardian or committee without the special direction of the court. The order in this case was made upon the authority of *In re Venner's Settled Estates* (1), and the decision in that case was come to after a consideration of the 36th section of the act. The words of the section are merely permissive. It was intended to leave each case to the ordinary rules and practice of the court, which are, that a person of unsound mind not so found by inquisition may sue or defend by his guardian. The case of *In re Venner's Settled Estates* is a proof that the statute has been in the same manner acted upon for several years, and it will be for the benefit of the public that the statute in this particular be not made a dead letter. If the case of *In re Venner's Estates* be overruled, numerous titles will in all probability be upset. On these grounds it is submitted that the order asked for ought to be made.

Mr. *North*, for the purchaser: The language of the 36th section is express. Consents to such applications must be given by committees on behalf of lunatics as they must be by assignees of bankrupts or insolvents. As regards committees, they must be appointed by the court having jurisdiction in lunacy. The order in this case, however, states that John Clough Williams-Ellis was appointed guardian of the person of unsound mind, and of infants, for the purpose of consenting on their behalves; and that he should be at liberty, on behalf of the infants, to consent to the application; and consequently the court did not give the guardian leave to consent on behalf of the person of unsound mind. The 27th and 28th sections of the Leases and Sales of Settled Estates Act are very important. By the former the court is not to authorize any act which could not have been authorized by the settlor; and by the latter the acts of the court in professed pursuance of the act are not to be invalidated, except that no lease, sale, or other act "shall have any effect against any person whose concurrence in or consent to the application ought to have been obtained and was not obtained." The words of that section show that proceedings cannot go on

(1) Law Rep. 6 Eq., 249.

without consents in *certain cases, and there is no way of [287 obtaining the consent of a person of unsound mind except by a committee properly appointed. The person of unsound mind should he recover, or the committee should one be appointed, would be able to recover the estate in an action of ejectment, unless it could be shown that the consent to the sale had been obtained in the manner pointed out by the 36th section. The purchaser wishes to expend a considerable sum of money on the estate, and though he is a willing purchaser, he is unwilling to take a bad title. *In re Venner's Settled Estates* ⁽¹⁾ does not apply to this case. If it should be considered that it does, then I contend that the decision was not a right one upon the construction of the 36th section of the act. It cannot be contended that that decision will bind the courts of common law; and the cases of *In re Turbutt's Estate* ⁽²⁾ and *In re Franklin's Estates* ⁽³⁾, cited in that case, do not bear out the order made by the master of the rolls. Those cases were exceptional, and are not of sufficient authority for the order asked. Therefore I submit that the summons ought to be dismissed.

Mr. Morgan, in reply: Though the order in *In re Venner's Settled Estates* was not made adversely, it is an authority, and has been acted upon, and in this very case. The production of the order showing the consent by the guardian would be a complete answer in an action of ejectment, for the consent of the guardian is as good as that of a committee. Putting the 36th section of the act aside, the court can, under its original jurisdiction, recognize the guardian as the proper representative for all purposes, as if he had been appointed in a suit; and that being so, the consent is of the person of unsound mind himself. But the language of the 28th section of the act is conclusive, for it says, that "after the completion of any lease or sale, or other act under the authority of the court, and purporting to be in pursuance of this act, the same shall not be invalidated on the ground that the court was not hereby empowered to authorize the same." Then comes the exception which has been referred to, that no sale shall have any effect *against any [288 person whose concurrence in the application ought to have been obtained and was not; but this gentleman's concurrence was (within the meaning of the 36th section) obtained; if it was not, then the case is covered by the general practice of the court.

SIR W. M. JAMES, L.J.: I am of opinion that the objection of the purchaser to this title is well founded. The question in this case has never been before any court upon an application in which the persons interested have raised it. If there were a decision of any court showing that the mode adopted in this particular case had been adopted in other cases as the proper mode,

(1) Law Rep. 6 Eq., 249.

(2) 2 N. R., 158.

(3) 7 W. R., 45.

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McKechnie v. Vaughan.

L.J.J. for V.C.W.

I should consider myself bound by the decision and follow it. I cannot in this case follow the order in *In re Venner's Settled Estates* ⁽¹⁾. By reliance on that case the parties here have, on my view of it, been led astray. This gentleman of unsound mind now may recover, and if he does not, a committee may be appointed, and in either case an action of ejectment might be brought to recover the property; and that being so, I do not see how I can, looking at the language of the 28th section of the act, make the order asked for. This gentleman is a person whose concurrence in the application ought to have been obtained; but, in fact, it was not obtained, because he was not in a fit state of mind to give his concurrence. All these applications and consents are matters of statutory jurisdiction. The court has no general jurisdiction to give consent. The power is expressly confined by the statute to special cases, and within those cases this one does not come. I am of opinion that this court has no power to appoint a guardian in such a case. I may observe, that the application in *In re Venner's Settled Estates* was a mere *ex parte* one; but in this case the purchaser has taken an objection to the title, and I am of opinion that he was warranted in so doing, and therefore the summons must be dismissed, and with costs.

Solicitors: Messrs. *Frankish & Buchanan*, agents for Messrs. *Gold, Edwards & Weston, Denbigh*; Messrs. *Gregory, Rowcliffes & Rawle*, agents for Messrs. *Frodsham & Nicholson, Liverpool*.

[Law Reports, 15 Equity Cases, 289.]

L.J.J. for V.C.W., Feb. 26, 1873.

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*McKECHNIE v. VAUGHAN.

[1871 M. 217.]

Will — Blanks — Number of Legatees — Incorrect Gift by a Testator.

Bequest "unto each of my four nieces, the daughters of my deceased brother Joseph, the sum of £500." There were five daughters of Joseph, who all survived the testator:

Held, that the blank left in the will was not sufficient to distinguish this case so as to take it out of the settled rule, and that each of the five nieces was entitled to a legacy of £500.

JOHN VAUGHAN, by his will, dated the 4th of November, 1866, made the following disposition: "I bequeath unto each of my four nieces, the daughters of my deceased brother Joseph Vaughan, the sum of £500, and I declare that the said sums shall be respectively for their sole and separate use, independently of their respective husbands. The testator gave the residue of his real and personal estate to the defendant Vaughan, whom he appointed executor. He died on the 16th

⁽¹⁾ Law Rep., 6 Eq., 249.

of September, 1868, being seized of considerable real and personal estate. At the date of his will and of his death there were five nieces, the daughters of his deceased brother Joseph Vaughan mentioned in the will, each of whom claimed to be entitled to a legacy of £500. The defendant Vaughan alleged that the gift was void for uncertainty. This bill was accordingly filed by two of the nieces of the testator, praying that it might be declared that the plaintiffs and the other three nieces, daughters of the testator's deceased brother Joseph Vaughan, were entitled each to a legacy of £500 to her separate use.

Mr. *Dickinson*, Q.C., and Mr. *E. Culler*, for the plaintiffs:

The case is governed by authority: *Garvey v. Hibbert* ⁽¹⁾ and the cases collected in Jarman on Wills ⁽²⁾.

Mr. *Morgan*, Q.C., and Mr. *Proctor*, for the residuary legatee: This is distinguished from the ordinary cases by the blanks contained in the will. It is quite settled that the blanks [290 must be regarded like every other part of the will: *Mason v. Bateson* ⁽³⁾; *Taylor v. Richardson* ⁽⁴⁾. Looking, then, at these blanks, it is clear that the testator intended to select certain members of the class, that is, four out of the five, but not having done so, the only conclusion the court can come to is, that the whole gift is void for uncertainty.

Mr. *Mitchell*, for the trustee.

Mr. *Jackson*, Q.C., and Mr. *Yale Lee*, for other parties.

SIR W. M. JAMES, L.J.: The case is governed by authority, and putting aside for the moment the blanks in the will, the court would be bound to hold that each of the five nieces is entitled to a legacy of £500. Then do the blanks make any difference? It is said that the inference to be drawn from the occurrence of these blanks is, that the testator intended to select as objects of his bounty four out of the five nieces, and that not having done so the gift is void for uncertainty. It certainly is possible that such was the testator's intention. But may it not be that he was ignorant of the state of the family? This seems to me a much more probable hypothesis than that he intended to select four out of five of his nieces. What is there in the circumstances to make such an explanation likely? In my opinion the existence of these blanks in this will affords no substantial ground for taking this case out of the ordinary rule. There must, therefore, be a declaration that each of the five nieces is entitled to a legacy of £500.

Solicitors for the plaintiffs: Messrs. *J. & R. Gole*.

Solicitors for the other parties: Messrs. *Sharp & Ullithorne*; Messrs. *Simpson & Cullingford*.

⁽¹⁾ 19 Ves., 124.

⁽²⁾ 3d Ed. vol. ii., p. 179.

⁽³⁾ 26 Beav., 404.

⁽⁴⁾ 2 Drew., 16.

[Law Reports, 15 Equity Cases, 305.]

M.R. March 13, 1873.

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*SHERRATT V. MOUNTFORD.

[1868 S. 129.]

Will—Words, “My Nephews and Nieces”—Nephews and Nieces of Testator’s Wife.

Residuary gift in trust for “my nephews and nieces living and the issue of any my nephews and nieces dead before me.” Testator left brothers and sisters, but never had any nephews or nieces of his own.

Held, that his wife’s nephews and nieces were entitled to the gift.

JAMES BILLINGS, by his will, after a devise and bequest to his cousins John and Hugh Mountford, proceeded as follows: “All the rest of my property, real and personal, I give to my said cousins in trust for them and my nephews and nieces living, and the issue of any my nephews and nieces dead before me, such issue taking only the parent’s share. The testator, though he had some brothers and sisters, never had any nephews and nieces of his own, but there were several nephews and nieces of his wife. The testator’s wife died before the date of his will. Some of her nephews and nieces survived the testator, and some had died leaving issue in the testator’s lifetime. The suit was instituted by a nephew of the testator’s wife, claiming, on behalf of himself and her other nephews and nieces and the issue of such of them as were dead, an interest in the said residuary gift.

Mr. *Roxburgh*, Q.C., and Mr. *Batten*, for the plaintiff: The words in the residuary gift, in favor of “my nephews and nieces living, and the issue of any my nephews and nieces dead before me,” must, in the absence of any relatives of the testator 306] *answering that description on his own side, be taken to mean his wife’s nephews and nieces, whom, in a popular sense, he would call his own. In the case *Grant v. Grant* (1), where a testator devised property to “my nephew Joseph Grant,” and appointed him his executor, and it appeared that the testator’s brother had a son named Joseph Grant, and that the brother of the testator’s wife had also a son of the same name, it was held by Lord Penzance in the Probate Court, and subsequently by the Court of Common Pleas, and, on appeal, by the Exchequer Chamber, that the description “my nephew” was applicable to both Joseph Grants, and that parol evidence was admissible to show which of them was meant by the testator. Here there are no other persons who can answer the description except the wife’s nephews and nieces, who are, therefore, entitled to take.

Sir *R. Baggallay*, Q.C., and Mr. *Vaughan Hawkins*, for the exe-

(1) Law Rep., 2 P. & D., 8; *Ibid.*, 5 C. P., 350, 727.

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cutors: The plaintiff and those he represents are not entitled to take under the description of "my nephews and nieces." Strangers in blood to a testator, though related by affinity, cannot be included in words used to designate blood-relations unless they are expressly designated in the will: *Smith v. Lidiard* ⁽¹⁾. It is true that there are no other persons to answer the description given by the testator, but that is not enough to induce the court to alter the proper meaning of the words used in the will: *In re Standley's Estate* ⁽²⁾. There are, undoubtedly, cases where the court has extended the ordinary meaning of words, as in *In re Blower's Trusts* ⁽³⁾, but then there must be some indication on the face of the will, and not derived merely from extrinsic evidence. In *Hogg v. Cook* ⁽⁴⁾, where there was a bequest to a testator's grandchildren, nephews and nieces, and the testator had no brothers and sisters, and therefore no nephews and nieces, your lordship held that the nephews and nieces of his wife were entitled; but that case cannot govern the present, because here the testator had *brothers and sisters, and [307 therefore there was a possibility of nephews and nieces of his own being born after the date of his will and before his death.

Mr. *Bevir*, for the heir-at-law.

Mr. *Southgate*, Q.C., and Mr. *Humphreys*, for the next of kin.

LORD ROMILLY, M.R.: I have before decided, and still hold, that where there is a gift by will to "my nephews and nieces," and a testator has none of his own, but there are nephews and nieces of his wife, such persons being commonly spoken of as a man's own nephews and nieces, they are entitled to take. There will be a declaration accordingly.

Solicitors for the plaintiff: Messrs. *Wedlake & Letts*, agents for Messrs. *Keary & Marshall*, *Stoke-upon-Trent*.

Solicitors for the defendants: Messrs. *Tibbitts & Co.*; Mr. *J. Burton*.

⁽¹⁾ 3 K. & J., 252.

⁽²⁾ Ibid. 11 Eq., 97.

⁽³⁾ Law Rep., 5 Eq., 303.

⁽⁴⁾ 32 Beav., 641.

[Law Reports, 15 Equity Cases, 307.]

M. R. March 14, 1873.

SLARK V. DAKYNS.

[1873 S. 213.]

Will—Power to appoint to Children—Gift to Child of Life Interest with Power to appoint by Will.

A testator gave certain property upon trust for his granddaughter A. for life, and after her death for her children, or some of them, as she should by deed or will appoint. A, by her will, appointed one-fifth of the fund to each of five child-

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ren (all of whom were living at the death of the original testator) for life, and after the death of each child, directed that the share in which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment, in favor of the children of the said five children and of the survivors in different events:

Held, a good exercise of the power of appointment given by the will of the testator.

Phipson v. Turner (1) followed.

WILLIAM BOUND, by his will, dated the 2d of April, 1838, gave certain real and personal estate to trustees upon trust for 308] *his granddaughter, Anna Maria Slark, for life, and after her death upon trust for her children, or some of them, or some of their heirs, executors, or administrators, as she should by deed or will appoint; and in default of appointment, for all her children who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, their heirs, executors, and administrators, in equal shares as tenants in common. The testator died in 1846. Anna Maria Slark had six children, viz., Eliza Jane Cope, Anna Maria Dakyns, Emily Ann Cope, Ellen Mary Bird, Louisa Laura Cobbett, and William Slark, all of whom were living at the death of the testator. By her will, dated the 8th of December, 1865, Anna Maria Slark directed that out of the funds, subject to the trusts of the will of William Bound, an annuity of £100 a year should be paid to Anna Maria Dakyns, and subject thereto that the said funds should be held upon trust as to one-fifth share thereof to pay the income of such share to William Slark for his life, and as to another one-fifth share to pay the income of such share to her daughter Eliza Jane Cope during her life for her separate use, without power of anticipation (so far as such restriction could be lawfully imposed); then followed similar appointments as to the remaining three-fifths in favor of Emily Ann Cope, Ellen Mary Bird, and Louisa Laura Cobbett. And the testatrix directed that, subject to the trusts thereinbefore declared for the benefit of William Slark, Eliza Jane Cope, Emily Ann Cope, Ellen Mary Bird, and Louisa Laura Cobbett, the one-fifth share, the income whereof was thereinbefore provided for each of them during his or her respective life, should, after his or her decease, go and be held upon and for such trusts and purposes as he or she respectively should by will appoint: provided always that if her said son, or any of them her said last-named daughters, should survive her, and should have any child who should be living at his or her respective death, or should previously have died having attained the age of twenty-one years, then the share thereby made subject to the appointment by will of her said son, or (as the case might be) of such daughter, or such part thereof as should not have been

(1) 9 Sim., 227.

absolutely appointed under the aforesaid power in that behalf, should go and be in trust for her said son, or (as the case might *be) such daughter, and his or her heirs, executors, ad- [309 ministrators, and assigns, for his, her, and their respective absolute use and benefit: provided also that if the said son, or any of them her four last named daughters, should die in her lifetime, or, having survived her, should afterwards die without having had any child who should be living at his or her respective decease, or who should have died after having attained the age of twenty-one, then (in default of any direction or appointment to the contrary under the powers thereinbefore in that behalf contained) the share or shares thereinbefore originally appointed to him or her during his or her life, and made subject to his or her appointment as aforesaid, as well as the share or shares by the present proviso surviving or accruing, should be held in trust for the survivors or survivor or others or other of her said son and four last named daughters; and if more than one, in equal shares, but so that the share or shares of each of them under the present proviso should go and be upon and for such and the same or the like trusts, intents, and purposes as were thereinbefore declared concerning his or her original share. The testatrix died in 1871. Eliza Jane Cope died in 1870, intestate, and leaving her husband and a child surviving; all the other children survived the testatrix. Upon the death of the testatrix the question arose whether the share given to Eliza Jane Cope for life and over was well appointed by the will of the testatrix; and this suit was instituted for the purpose of ascertaining the rights of the parties.

Mr. *Southgate*, Q.C. (Mr. *J. W. Chitty* with him), for the plaintiff William Slark, submitted that the share of Eliza Jane Cope was well appointed, relying on *Phipson v. Turner* ⁽¹⁾, cited in *Sugden on Powers* ⁽²⁾.

Mr. *A. T. Watson*, for Anna Maria Dakyns and the other surviving daughters of Mrs. Slark:

I contend that the appointment made by Mrs. Slark is bad, so far as it confers on her children power to appoint by will. The power conferred on Mrs. Slark by the will of William Bound was *to appoint to children only; that was not properly [310 exercised by giving to a child a life interest in a share, with power to appoint by will, though it would have been otherwise if the power had been to appoint by deed, for then a child might have appointed to himself, or, at all events, he would have had complete dominion over the share, which he had not in the present case. *Phipson v. Turner* ⁽¹⁾ stands by itself. It was partly founded on the case of *Bray v. Bree* ⁽³⁾, but there life interests

⁽¹⁾ 9 Sim., 227.

⁽²⁾ 8th Ed., p. 688.

⁽³⁾ 2 Cl. & F., 453.

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were given to the appointees, followed by powers to appoint by deed or will, and not by will only, as here. Again, the vice chancellor said: "Suppose that Mrs. Tomlinson had appointed to her daughter, Mrs. Phipson, and then had directed that such part of the fund as should not be disposed of by will or otherwise should go to her two sons, it cannot be disputed that that would have been a good exercise of her power." I submit, however, that recent decisions have shown that such a gift over would have been bad for repugnancy: *Holmes v. Godson* ⁽¹⁾; *Barton v. Barton* ⁽²⁾. This power to appoint by will being bad, the gift over is bad also; and the share must go, under the will of William Bound, as in default of appointment.

Mr. W. Pearson (Mr. Fry, Q.C., with him), for the husband and child of Eliza Jane Cope, submitted that the share must go under the will of William Bound as in default of appointment, on the ground that the gifts after the life interests to the children were void for remoteness: *Wollaston v. King* ⁽³⁾.

LORD ROMILLY, M.R.: I must follow *Phipson v. Turner*. Even if it were wrongly decided, I could not overrule it at this distance of time. As to the question of remoteness, it does not arise, as all the children of Mrs. Stark were in existence at the time of the creation of the power. I am of opinion, therefore, that the power is well executed.

Solicitor for all parties: Mr. H. P. Bird.

[Law Reports, 15 Equity Cases. 311.]

M.R., March 15, 1873.

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*HARRISS v. FAWCETT.

[1873 H. 53.]

Principal and Surety — Guarantee determinable by Notice from Guarantor — Death of Guarantor — Notice of Death — Determination of Guarantee.

A guarantee to continue in force until six months after notice in writing under the hand of the guarantor of his intention to discontinue the same:

Held, to be determined by notice of the death of the guarantor.

Bradbury v. Morgan ⁽⁴⁾ questioned.

THIS was a suit for the administration of the estate of Joseph Fawcett, under which the Wakefield and Barnsley Union Bank carried in a claim which was now brought before the court for adjudication. The claim arose on a written guarantee, dated the 21st of October, 1840, signed by Joseph Fawcett and addressed to the bank and their trustees, whereby Joseph Fawcett undertook and promised to the trustees to make good and guar-

⁽¹⁾ 8 D. M. & G., 152.

⁽²⁾ 3 K. & J., 512.

⁽³⁾ Law Rep., 8 Eq., 165.

⁽⁴⁾ 1 H. & C., 249.

antee to the bank the due and punctual payment of all such sums as might thereafter at any time or times be advanced or paid by or on account of the bank, or as the bank might at any time or times thereafter pay or become liable to pay for or on account of James Fawcett (a son of Joseph Fawcett) or his order; but so that the liability of Joseph Fawcett should not exceed at any one time the sum of £3000. The guarantee contained the following clause: "This guarantee or engagement shall be considered a continuing guarantee, and shall not be withdrawn, but shall continue in full force until six months after notice to the manager of the said bank, in writing under my hand, of my intention to discontinue the same." Joseph Fawcett died in September, 1867, having by his will appointed James Fawcett his sole executor. James Fawcett accepted the office. The bank made considerable advances to James Fawcett on the security of the guarantee, and at the time of his father's death he was indebted to the bank in upwards of £5415 8s. 8d. After the death James Fawcett continued to deal with the bank, *whose officers had notice that he was his father's exe- [312] cutor. James Fawcett died in March, 1870. He had in the interval between his father's death and his own paid the bank sums far exceeding £5415 8s. 3d., but he was at his death indebted to the bank in the sum of £2345 7s. 4d., for which the bank now claimed to prove against Joseph Fawcett's estate under the guarantee. No notice to discontinue the guarantee was ever given either by Joseph or James Fawcett.

Mr. *Fry*, Q.C., and Mr. *Freeling*, for the bank: There appears to have been formerly a notion that a guarantee such as this was revoked by the death of the guarantor: *Smith's Mercantile Law* ⁽¹⁾; but the contrary was decided after an elaborate argument in *Bradbury v. Morgan* ⁽²⁾. On the authority of that case this claim must be allowed. [They also referred to *Offord v. Davies* ⁽³⁾.]

Mr. *Southgate*, Q.C., and Mr. *Bathurst*, for the plaintiffs in the suit: *Bradbury v. Morgan* was decided on demurrer, and it was admitted by the pleadings that the plaintiffs, to whom the guarantee was given, had no notice of the death of the guarantor when they made their advances. In the present case it is admitted that the debt sought to be proved was incurred after the bank had notice of the death of the guarantor. Further, the bank had notice that James Fawcett, with whom they dealt, was the sole executor of Joseph Fawcett, who gave the guarantee: the bank must therefore be taken to have known that it was the duty of James Fawcett to determine the guarantee, and that his not doing so was a breach of trust; and under

⁽¹⁾ 4th Ed., p. 425.

⁽²⁾ 1 H. & C., 249.

⁽³⁾ 12 C. B. (N. S.), 748.

these circumstances the bank cannot be allowed to avail themselves of any right to prove under the guarantee. *Watkins v. Cheek* ⁽¹⁾ illustrates this doctrine of the court.

Mr. *W. Pearson*, for the defendants.

The MASTER OF THE ROLLS: I am not at all disposed to go beyond the point decided in *Bradbury v. Morgan*.

313] *Mr. *Fry*, in reply, urged that the judgments delivered in *Bradbury v. Morgan* ⁽²⁾ did not turn in any way on the absence of notice of the guarantor's death.

LORD ROMILLY, M.R.: I admit that there is very little distinction between this case and that of *Bradbury v. Morgan*; but there is this distinction between the two cases: here the guarantor is dead, and the bank knew of his death; in the other case (which was decided upon demurrer) it was admitted by the pleadings that they did not know of his death. Whether that is material or not I do not now intend to inquire; and I fully admit that the judges do not found their judgment upon that in the slightest degree; but I am unable to follow the reasoning upon which their decision is founded. I think it a very startling thing to say, as the chief baron in effect does say there, that the words "I give you notice" mean "you receive notice." It is a very startling proposition, because, if so, if a stranger gave notice in the lifetime of the guarantor, that would be a sufficient notice to determine it. But surely that can hardly be meant. This guarantee is very distinct; it is to continue "until six months after notice to the manager of the said bank, in writing under my hand, of my intention to discontinue the same." What does the guarantor mean? Would it be sufficient if somebody else gave a notice, and without it being under the hand of the guarantor? Can anybody contend, or would even the chief baron maintain, that that would be a sufficient notice? Then is the guarantee to go on for ever, in the case of the death of the guarantor? I am of opinion that as notice has not been given, as it could not be given after the death of Joseph Fawcett, and as the bank knew it could not be given, thereupon the guarantee was over. I am not disposed to follow *Bradbury v. Morgan* even in a case exactly similar, and certainly I shall not extend that case. I shall therefore dismiss the claim with costs.

Solicitors: Messrs. *Torr, Janeway, & Co.*; Mr. *Stretton*; Messrs. *Sharp & Ullithorne*.

⁽¹⁾ 2 S. & S., 199.

⁽²⁾ H. & C., 249.

[Law Reports, 15 Equity Cases, 314.]

M.R. March 24, 1873.

*BILLSON v. CROFTS.

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[1872 B. 378.]

Gift over on Insolvency — Composition Deed — Recital of inability to pay Debts — Forfeiture.

By a will certain property was given upon trust for A during his life, or until he should become bankrupt or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, and after the happening of any such event, over.

Held, that the gift over took effect upon A executing a composition deed containing a recital that he was unable to pay his debts in full; and that A could not afterwards dispute the accuracy of the recital.

SAMUEL BILLSON, by his will, dated the 30th of April, 1861, gave certain property to trustees upon trust to pay the income to the plaintiff during his life, or until he should become bankrupt or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, and after the happening of any such event to pay the same income to the defendant Mary Billson for her life. The testator died in 1862. On the 19th of November, 1868, the plaintiff executed a composition deed, reciting, amongst other things, that he had become indebted to his creditors in divers sums of money which he was unable to pay in full; and he thereby covenanted to pay his creditors a composition of 10s. in the pound, but made no assignment of any part of his property. The object of the suit was to obtain a declaration that the plaintiff had not forfeited his life interest under the will of Samuel Billson by executing this deed. It appeared that at the time the plaintiff executed the deed he was entitled to a reversionary interest under the same will, but was not aware that he was so entitled; and it was alleged by the bill, and there was some evidence to show, that the value of this reversion would have been more than sufficient for payment of all his debts in full.

Sir R. Baggallay, Q.C., and Mr. Field, for the plaintiff, [315 submitted that, as the plaintiff had neither become bankrupt nor insolvent, nor executed any assignment for the benefit of his creditors, he had not forfeited his interest under the will.

Mr. J. W. Carlile, for the surviving trustees of the will.

Mr. Southgate, Q.C., and Mr. Cozens-Hardy, for Mary Billson: The plaintiff has not, in point of fact, paid his debts in full, and that constitutes insolvency within the meaning of the testator,

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and the fact that he had property sufficient to enable him to do so makes no difference; *Parker v. Gossage* ⁽¹⁾; *Biddlecombe v. Bond* ⁽²⁾; *De Tastet v. Le Tavernier* ⁽³⁾ *Re Mugeridge's Trusts* ⁽⁴⁾; *Freeman v. Bowen* ⁽⁵⁾; *Montefiore v. Enthoven* ⁽⁶⁾.

Sir R. Baggallay, in reply: The cases cited only show that the recital in the deed is *prima facie* evidence of insolvency; but the plaintiff is not estopped from showing that he was in fact solvent, and he has done so. If the recital had been fraudulent, it may be that the court would have held the plaintiff bound by it; but the plaintiff was ignorant of his rights, and committed no fraud.

LORD ROMILLY, M.R.: I think that the cases show that the plaintiff is bound by the statement in the deed he has executed, and that he cannot now dispute his insolvency. I have little doubt that the plaintiff was really insolvent at the time when he executed the deed, but the recital settles the question; and I must make a declaration that the plaintiff's life interest has ceased.

Solicitors: Messrs. *Field, Roscoe & Co.*; Messrs. *Sharpe, Parkers, & Co.*

⁽¹⁾ 2 C. M. & R., 617.

⁽⁵⁾ Joh., 625.

⁽²⁾ 4 A. & E., 332.

⁽⁴⁾ 25 Beav., 17.

⁽³⁾ 1 Keen, 161.

⁽⁶⁾ Law Rep., 5 Eq., 35.

[Law Reports, 15 Equity Cases, 318.]

V.C.B. Feb. 26, 1878.

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*NORRIS V. FRAZER.

[1869 N. 18.]

Will—Absolute Bequest—Secret Trust—Husband and Wife—Marital Right.

Testator gave the residue (which amounted in value to about £6500) of his personal estate upon trust to permit a married woman to receive the income during her life, with remainder after her death for the benefit of her children, and if no children, for the husband absolutely. In the event of the death of the wife in the lifetime of her aunt N, testator directed the then legally secured income of the aunt, if below £250 a year, should be made up to that amount.

From the death of the testator, in April, 1861, down to February, 1865, an annuity of £300 was regularly paid to N, by arrangement, out of the husband's banking account; but the wife having eloped in September, 1864, the payment was, after the above date, discontinued.

In 1869, the bill was filed by N against the husband and wife, alleging by amendment, after the answer of the wife (who supported the plaintiff's case) had come in, that the husband and wife both promised the testator, at his request, on his death-bed, to make an allowance of £300 a year to the plaintiff, and praying for a declaration that the income of the testator's residuary real and personal estate "was and is subject to a trust" for the payment of £300 a year to the plaintiff during the wife's life, if the plaintiff should so long live; and for payment of the arrears of the annuity by the husband.

The husband denied having made any such promise; but it having been found as a result of the evidence that a promise, as alleged, was made to the testator by the wife, and was assented to by the husband:-

Held, that the income of the testator's estate was subject to the alleged trust; and an account and payment ordered accordingly.

No costs allowed to the plaintiff, who was merely a nominal suitor; the suit being, in substance, that of the wife.

McCormick v. Grogan (*) followed.

CAUSE. Charles King, of Brighton, by his will, dated the 14th of July, 1832, bequeathed £10,000 to John Witt, George Weeks Willis, and Frank Atkinson Argles, upon trust to pay the income of the investment to his only child, Georgiana Clara King, for life, for her separate use, and on her death to divide and pay the same between and unto her children as therein mentioned. Having given a legacy of £8000 to G. W. Willis, and a legacy of £1000 to his daughter's aunt, Nancy Ann Norris, he bequeathed the residue of *his personal estate (in the [319 events which happened) to Georgiana Clara King absolutely. On the 12th of October, 1854, Georgiana Clara King married the Rev. Arthur Bruce Frazer. Charles King died on the 27th of November, 1860, and his will was duly proved by the three above-named trustees, who were also appointed executors. The personal estate amounted to nearly £60,000.

On the 17th of January, 1861, G. W. Willis, who had lived with Charles King at his house at Brighton, and was supposed to be his natural son, made his will, whereby he gave the residue of his real and personal estate to trustees thereafter named, upon trust to convert and get in the same, and invest the proceeds as therein mentioned, and permit Mrs. Frazer to receive the income during her life; and after her death, he directed that the funds should be in trust for and to be equally divided among all her children. In the event of the death of Mrs. Frazer during the lifetime of her husband, without leaving a child or children, testator gave the residue of his real and personal estate to Mr. Frazer absolutely, subject to an outlay of £800 as therein mentioned. Testator further directed that, in case Mrs. Frazer should die in the lifetime of her aunt, Nancy Ann Norris, and Miss Norris should be then entitled to and should be in the actual receipt of an annual income of less than £250 a year, legally and properly secured to her, a sum should be appropriated or realized from his real and personal estate, the annual income of which should be sufficient to make up, with the legally secured income which Miss Norris might then have, the sum of £250, and which annual income he desired should be paid by his trustees to Miss Norris half-yearly, for her life, and after her death the principal so realized should form

(*) Law Rep., 4 H. L., 82.

part of the residue of his personal estate. The testator appointed John Witt, Arthur Bruce Frazer, and William Henry Moberley, his executors, and John Witt, Arthur Bruce Frazer, and Georgiana Clara Frazer, his wife, his trustees.

By a codicil, dated the 17th of January, 1861, to the above will, the testator devised to Mrs. Frazer, her heirs and assigns, for her and their own separate use, absolutely, a freehold house, called Lottery Hall, Orchard Place, Southampton.

320] *The testator Willis died on the 26th of April, 1861. His residuary personalty amounted to about £6500. This sum was at first advanced on mortgage to Mr. Frazer, and was afterwards invested in £3 per cent stock, yielding about £208 a year.

On the 31st of May, 1862, Mr. Frazer executed a voluntary settlement of a sum of £27,000 new 3 per cents, which had formed part of the residuary estate of Charles King, and to which he (the settlor), having reduced the same into possession, had become entitled in right of his wife, upon trust, during the joint lives of himself and his wife, for Mrs. Frazer for her separate use, and after the death of such one of them as should first die, for the survivor for life, and after the death of the survivor, for the benefit of the children of the marriage, and if there should be no child, then, in case Mrs. Frazer should survive, upon trust for her absolutely; if not, for her next of kin. Questions having been raised as to the ultimate destination of the above legacy of £10,000, that sum was paid into court, and now consisted of a sum of £10,819 13s. 6d. stock; and by an order dated the 12th of December, 1862, the dividends were directed to be paid to Mrs. Frazer for life for her separate use.

On the 13th of September, 1864, Mrs. Frazer eloped from Mr. Frazer. From the testator Willis's death down to February, 1865, a sum of £300 a year was regularly paid to Miss Norris out of Mr. Frazer's account at his bankers, Messrs. Hall & Co., of Brighton, but after that date payment was discontinued.

On the 19th of May, 1865, Mrs. Frazer's then solicitors, Messrs. Clarke, Son, & Rawlins, wrote to Mr. Somers Clarke, of Brighton, Mr. Frazer's solicitor, saying they had heard from Mrs. Frazer, and that she said the fact of Mr. Frazer declining to contribute anything towards her aunt's £300 a year filled her with astonishment; and that if he still declined to assist her in this payment she had no alternative but to insist on payment of her October dividends. These dividends being accounted for, Mrs. Frazer engaged to pay the £300 a year to her aunt, and the writers said that as soon as the money came to hand they were authorized to apply the same accordingly. They also said that Mrs. Frazer had some reason to think that her husband had **321]** privately already paid £150 to the *aunt, and if so, that

they were authorized to repay him the amount; and on the 24th of May the money was accordingly sent.

On the 23d of September following Messrs. Clarke, Son, & Rawlins wrote to Mr. Somers Clarke as follows: "We have a note from Mrs. Frazer, asking you to make application to Mr. Frazer, through you, for his consent to her trustees finding a better investment for the money in her marriage settlement now in the funds. She asks us to point out to you that she pays her aunt £300 a year, and that residing abroad she has to expend more than she should have to do in England for the same amount of comfort. We are apprehensive that if this application be not favorably accepted, Mrs. Frazer will be compelled to reduce her aunt's allowance to £150 a year as long as she is compelled to reside abroad. Although we quite admit that Mrs. Frazer is not entitled to ask the favor at her husband's hands, more especially if it be in anyway to his prejudice, yet, as the money comes from her family, and Mr. Frazer cannot be at all prejudiced by acceding to her wish, we trust that he will kindly give his consent." . . .

On the 18th of October following Mr. S. Clarke answered: "Mr. Frazer will not raise any objection to the settlement money in the funds being invested on mortgage for a better rate of interest, with a view to secure to Miss Norris the allowance of £300 a year." On the 16th of December Mr. S. Clarke, in a letter to Miss Norris, said: "In regard to the investment of the money so as to yield a better percentage and increase Mrs. Frazer's income, Mr. Frazer has consented to it; and I think the trustees cannot well refuse the joint request of Mr. and Mrs. Frazer; and if Mrs. Frazer will engage to pay you the £300 a year, I should think it would be a further inducement to them to do it."

In June, 1866, Mr. Frazer's solicitor's threatened proceedings for a divorce, which were shortly afterwards abandoned. In October of the same year, the subject of the change of security, and of providing a permanent income for Miss Norris, was again referred to; and on the 25th of March, 1867, Mrs. Frazer wrote to Mr. S. Clarke to say she was quite determined not *to [322 do anything for her aunt unless her own income was increased, and that if he (Mr. Clarke) would pledge himself to re-invest the £13,000 then in the funds, and the £6000 mortgaged to Mr. Frazer, as soon as the dividends should be paid next month she would give her aunt at once sufficient for her present wants, and allow her £200, from the 1st of May, yearly. To this the solicitor replied; and on the 28th of March, Mrs. Frazer again wrote to Mr. Somers Clarke as follows: "Thanks for your so promptly replying to my letter; and I am sorry to be obliged to

trouble you again, but unless the £6000 is also re-invested I shall only allow my aunt £150 a year; therefore it is for Mr. Frazer to consider whether he will not thus indirectly contribute to my aunt's comfort, for he, conjointly with me, promised Mr. Willis on his death-bed to give my aunt £300 a year out of my father's estate, and of this estate he took one half. A very old friend of Mr. Willis's, who saw him shortly before his death, writes me thus: 'Considering the very large sum that Mr. Frazer has obtained through you, it does seem to be the height of meanness and injustice to make believe that any conduct of yours can absolve him from keeping faith with the dead.' And, as long as Mr. F. compels me to be his wife, I fully agree with the writer."

In answer, Mr. Clarke observed that a large portion of the unsettled part of Mr. King's property had been spent by Mrs. Frazer; that she had had the control of the bankers' account; that the question was one of "contribution out of income from what is left of your father's property", of which Mrs. Frazer had had the larger portion, and the writer could not see that Mr. Frazer and she stood in equal position to Miss Norris.

In reply, on the 30th of March, Mrs. Frazer said she admitted the question was one of "contribution out of income from what is left of my father's property," and repeated her promise, that if the re-investments were made as requested, she would give her aunt £200 a year; and nothing would convince her but that Mr. Frazer was bound indirectly (as he would not directly) to contribute.

Shortly after Miss Norris wrote to say that £150 a year would not be sufficient for her, and that her niece had promised to allow her £200, if her (Mrs. Frazer's) money were re-invested; and Mr. 323] *S. Clarke replied, that, with the understanding and engagement on Mrs. Frazer's part to allow Miss Norris the £150 a year, he would endeavor to get the trustees to invest the money so as to produce a larger income. This change was afterwards made, and the greater part of the £27,000 New £3 per cents was sold out and invested in securities yielding a higher rate of interest.

In March, 1869, Miss Norris filed the present bill against Mr. and Mrs. Frazer and John Witt, stating the will of G. W. Willis, alleging that the testator Willis, after the execution of his will, informed Mr. and Mrs. Frazer that he had conferred large benefits on them by his will, and "expressed to them his desire" that they should "thereout" make a provision for the plaintiff of £300 a year from the testator's death; that each of them "promised and agreed with the testator to carry such desire into effect," and that "the testator communicated to the plaintiff such promise and agreement." Further, that the trus-

tees of the will had, out of the residue, appropriated a sum of £6500, or thereabouts, and invested the same on mortgage, for the express purpose of paying the annuity of £300 a year during the plaintiff's life; that the plaintiff had received "from Mr. Frazer, or by his order, as the acting trustee" of the will "and in pursuance of the trust in the plaintiff's favor," the annuity of £300, by quarterly payments, from the decease of the testator to the 27th of February, 1865, but not since; and that Mr. Frazer had received all the income of the residuary real and personal estate of the testator Willis, since the last date, up to the 5th of October, 1868, and had retained the arrears of the annuity for his own use. The plaintiff submitted that the defendants, Mr. and Mrs. Frazer, accepted the benefits conferred on them by the will of Willis, upon a bargain made by them with the testator, under the circumstances thereinbefore stated, that they should, "out of their respective interests under the residuary devise and bequest, or otherwise," make up to the plaintiff a provision of £300 a year; that such benefits were left unrevoked on the faith of such bargain; and that, if such bargain had not been made and relied on by the testator, he would have executed a legal disposition in the plaintiff's favor to the effect of the above trust.

*The bill prayed for a declaration, that the income of the [324 residuary real and personal estate of the testator Willis, and of the investments thereof for the time being payable to Mrs. Frazer, or to Mr. Frazer in her right, "was and is subject to a trust" for paying to the plaintiff the annual sum of £300 during Mrs. Frazer's life, if the plaintiff should so long live; also for an account of the arrears due to the plaintiff, and that Mr. Frazer might be decreed to pay to her the sum which should be found due.

The executor John Witt filed an answer on the 7th of May, 1869, in which he admitted the appropriation of the sum of £6500, or thereabouts, but denied that it was appropriated in recognition of a trust in favor of the plaintiff, or of a trust impressed upon the residuary estate. He had not, nor had any of his co-trustees by his order or with his authority, paid the alleged annuity to the plaintiff; but he admitted that Mr. Frazer had, by his authority, and with his knowledge and consent, received the income of the residuary real and personal estate from the 27th of February, 1865, to the 5th of October, 1868.

Mr. Frazer, by his answer, filed the 9th of June, 1869, said that he had very few interviews with the testator Willis during his last illness. At none of such interviews was any mention made to him by Willis of his will or the contents thereof, except that Willis "in a casual way, and to the best of my belief on one occasion only, mentioned to me that he had left to me

and the said Georgiana Clara Frazer the bulk of what had come to him from the said Charles King." The principal part of Willis's estate and effects at his death consisted of the legacy of £8000 bequeathed to him by Charles King, and defendant denied that Willis expressed to him or to Mrs. Frazer, or either of them, his desire that he and she, or either of them, should, "out of any benefits or benefit which he had conferred upon us or either of us by his said will, or otherwise," make a provision for the plaintiff of £300 a year for her life.

The whole of the income to which the defendant and his wife were entitled was always paid to defendant's general account with Hall & Co., of Brighton, and defendant always allowed Mrs. Frazer, prior to her elopement, to draw checks against his account; which were always honored by the bankers. "Some 325] *arrangements were made by her, with my concurrence, for Messrs. Hall & Co., to make payments to the plaintiff," after the plaintiff had gone to London to reside. "Such payments were, I am informed and believe, made by quarterly remittances by Messrs. Hall & Co. to the plaintiff, and amounted to £300 a year, and were purely voluntary payments."

Since the elopement, the defendant, considering that Mrs. Frazer was entitled for life, for her separate use, to the income of the £27,000 stock, and of the £10,819 18s. 6d. stock, and to the freehold house, had not felt willing to make her any allowance; but the defendant had, from time to time, since occasionally paid to the plaintiff, who represented herself to be in need, sums of £10 or thereabouts. Such payments were made voluntarily, and without reference to any annuity. Defendant had been informed that since the elopement Mrs. Frazer, had, out of her income, paid to the plaintiff certain sums for her maintenance and support. Defendant positively denied the alleged bargain with the testator Willis, but he said he believed the testator told Mrs. Frazer that the plaintiff had been left to her care, and that she must provide for her. He denied that he, or, to the best of his belief, his wife, was, previously to the testator's death, cognizant of any expectation, wish, or confidence on the part of the testator, as to any provision being made for the plaintiff. He said that he concurred in the change of securities for the express purpose, as requested by Mrs. Frazer, of increasing her income, and of thereby enabling her "to pay to the plaintiff such allowance as she might be able or think fit to do."

Mrs. Frazer, by her answer, filed the 5th of August, 1869, said that the testator Willis, after the execution of his will, and shortly before his death, called her husband and herself into his room, and begged them to promise that they would make

an allowance of £300 a year to the plaintiff as long as she lived, and "this we both promised him to do, and such promise was forthwith communicated to the plaintiff." She further supported the other allegations of the bill.

On the 20th of March, 1871, the bill was amended, and, as amended, alleged that the testator, shortly before his death, sent for Mr. and Mrs. Frazer, and "begged them to promise" that they "would make an allowance of £300 a year to [326 the plaintiff, and that they "did so promise; and repeated the former charges and prayer. In answer to the amended bill, the defendant, Mr. Frazer, denied this allegation.

Miss Norris, the plaintiff, made an affidavit, in which she stated, that shortly before the testator's death he told her that Arthur and Clara had promised him to provide for her.

Mrs. Frazer, in an affidavit, deposed to a conversation to the same effect. She adduced, in confirmation, the following extract from a bill of costs of the then solicitors of Mr. and Mrs. Frazer, which had been produced under an affidavit of documents sworn to by Mr. Frazer: "1861. April 29. Attending Mr. and Mrs. Frazer at the grand parade, conferring with them on the annuity for Miss Norris, and the best mode of providing for it." She said that in 1864, after she had left Mr. Frazer, she heard he was about to take proceedings to obtain a divorce; and on that account, and not because she considered that there was any legal or moral obligation on her to pay the annuity of £300 to the plaintiff, or at all events exclusively, nor because she considered that Mr. Frazer was not bound to pay it, she repaid to Mr. Frazer the two quarterly payments above referred to.

On behalf of Mr. Frazer, Mr. Somers Clarke deposed, that shortly before Mr. Willis's death he was in frequent communication with the parties, and the sum of £300 was named as "a proper allowance to be made out of the income of the estate of Charles King" to the plaintiff, as Mrs. Frazer's aunt; but in none of such conversations was it ever mentioned that such sum would be provided otherwise than as a voluntary payment out of King's estate. He had an interview with Mr. and Mrs. Frazer after Mr. Willis's death and before his burial, "and it was then arranged" between Mr. and Mrs. Frazer that the annual sum of £300 should be paid quarterly by Messrs. Hall & Co. out of Mr. Frazer's account to the plaintiff, and remitted to her in London.

Mr. Frazer, in cross-examination on his affidavit, deposed that on one occasion Mr. Willis told him that the plaintiff was left to his niece's charge. Deponent was not sure that he did not speak on other occasions of a provision for the plaintiff, but it was always *to the same effect. Deponent did not remember [327

whether he made any observation in reply, but "distinctly" he "made no promise and gave no undertaking to provide for the plaintiff." Deponent had no recollection of hearing Mrs. Frazer on some of these occasions say that she would provide for the plaintiff. He could not state his belief one way or the other as to whether she did say so in his presence or not. He could not say whether or not, if she did say so, he ever expressed any dissent. He did not believe that he ever assented or dissented. Upon being asked whether he would swear that he did not assent, he said, "I will not swear that I did not assent."

Mrs. Frazer, in cross-examination, admitted that after the change of securities she received more income. She added, "I did not continue to pay my aunt the £300 per annum. I believe I did not pay her more than one or two quarters at the rate of £300 per annum. When Mr. Frazer broke his promise to get a divorce I ceased to pay it." She further said: "when I took these proceedings on behalf of plaintiff through my present solicitors, my main object was to force Mr. Frazer to obtain a divorce, and that is my object in continuing them."

The plaintiff was also cross-examined. She said: "I think my niece had told me that a Chancery suit was going on about this matter. I had not anything to do with the suit. . . . Mr. Willis was no relation of mine. He told me on his death-bed that Mr. Frazer and my niece had promised him that they would give me £300 per annum as long as I lived; and he said that he had made them promise that they would do so." She deposed to having, since February, 1865, received no money from Mr. Frazer, and only irregular payments from her niece—she thought never more than £300 in one year. "I do not remember that I ever suggested that I had any claims upon Mr. Willis's estate. I do not remember that Mrs. Frazer ever told me why this bill was filed. I wished for my money, and suppose she is trying to get it for me. I hope I am not responsible for any costs. I have not been able to take any part in the proceedings, because I have been ill for a long time." The defendant Witt had since died.

328] *Mr. *Eddis*, Q.C., and Mr. *R. O. Turner*, for the plaintiff: The authorities which establish the law on this question are *Russell v. Jackson* ⁽¹⁾, before Sir George J. Turner, then vice chancellor; *Tee v. Ferris* ⁽²⁾, before Lord Hatherley, then Vice Chancellor Wood; *Jones v. Badley* ⁽³⁾, before Lord Cairns, C.; and *McCormick v. Grogan* ⁽⁴⁾. If, upon the evidence, the court finds that the orally declared trust was communicated to and accepted by the devisee, it is enough. Here Mr. Frazer, when

⁽¹⁾ 10 Hare, 204.
⁽²⁾ 2 K. & J., 577.

⁽³⁾ Law Rep., 3 Ch., 362, 363.
⁽⁴⁾ Law Rep., 4 H. L., 82.

pressed, very fairly says, "I will not swear I did not assent." As to the amendment in the bill, it was not till Mrs. Frazer's answer came in that the plaintiff knew how high to put her case. The amended bill alleges that the testator asked them both to promise, and that they both did so promise; that is to say, in effect it alleges this, that if Mr. and Mrs. Frazer had not promised, the testator Willis would have altered his will. The acceptance of the trust by Mr. and Mrs. Frazer as a settled obligation on both, is shown by the extract from the bill of costs, and by the correspondence throughout. The discrepancies between Mr. Frazer's answer and his cross-examination weaken the effect of his evidence.

Mr. *Swanston*, Q.C., and Mr. *W. Renshaw*, for Mr. Frazer: The plaintiff is a mere nominal and unconscious suitor, subsidized by Mrs. Frazer, whose suit this is. Nothing but the clearest evidence will suffice to fasten an orally declared trust upon property. The *onus* is therefore on the plaintiff: *Jones v. Badley* ⁽¹⁾. Lord Westbury, in *McCormick v. Grogan* ⁽²⁾ speaks of the jurisdiction in these cases as "founded altogether on personal fraud." Where is the proof of fraud against Mr. Frazer? The only witness is Mrs. Frazer, who institutes this suit in the name of the plaintiff, and confesses her motives in so doing. Her evidence cannot be relied on when it is in conflict with Mr. Frazer's: and as to his evidence, all he meant to assent to was that Mrs. Frazer should provide for the plaintiff out of the estate of King, not that the plaintiff should be provided [329 for out of Willis's estate, which yields only £208 a year. Whatever may be the obligation upon Mrs. Frazer, nothing can bind Mr. Frazer but a communication from Willis to him and a promise made by him to Willis: *Moss v. Cooper* ⁽³⁾. These are not proved.

Mr. *Kingdon*, for Mrs. Frazer.

Mr. *Cecil Russell*, for the executor of Witt.

SIR JAMES BACON, V.C.: This is an extraordinary case. The disagreeable part of it is that it is a sort of sham. It is impossible for me not to attend to what has been said about the disputes between the husband and wife, although I am wholly powerless to administer any law upon the subject, or to touch the subject at all. But it is clear and plain, upon the examinations and upon the evidence before the court, that although this suit is instituted in the name of Miss Norris, it is, in point of fact, Mrs. Frazer's suit, as she admits. For the costs of the suit she says she is liable.

The only question for me to decide in the case between the

⁽¹⁾ Law Rep., 3 Eq., 535, 652.

⁽²⁾ Ibid, 4 H. L., 97.

⁽³⁾ 1 J. & H., 352, 366.

parties here litigant is, whether the plaintiff is entitled, as against Mr. and Mrs. Frazer, to establish the promise which is said to have been made by Mrs. Frazer and said to have been assented to by Mr. Frazer. The evidence, notwithstanding the statements in the bill, and the variance between the original and amended bill, is extremely simple. This gentleman being upon his deathbed, and having made his will, communicates to Mr. and Mrs. Frazer that he has left them all, or the bulk of, his property; and he either exacts a promise or expresses a wish and desire that an annuity of £300 should be provided for Miss Norris. Now it was not a new subject, as I gather from Mr. Somers Clarke's evidence; because he, in his evidence in chief, says that, upon several occasions, the subject of a provision for Miss Norris had been discussed and settled between the testator and Mrs. Frazer, and that the sum of £300 had been fixed for that purpose. That is a fact not to be lost sight of in considering 330] the amount of evidence bearing *upon this case. The statements by the husband and the wife differ, no doubt, very much, if I contrast Mr. Frazer's answer with the allegations of his wife. The wife says that the testator exacted from her and her husband a promise that they would provide £300 a year for Miss Norris. I am quite aware of what Mr. Swanston has pressed, that the allegation in the evidence is that payment was to be made out of Charles King's estate. Nevertheless, if a promise was made at all, it was made at a time when the testator was speaking of his own estate and his own intentions, and when he was imposing a condition, upon Mrs. Frazer at least, that she should perform that promise, or whatever it may be called, that £300 a year should be paid to the plaintiff. The fund out of which it was to be paid is a matter of indifference. If he had said, "I will give you my estate on condition that you will pay £300 a year out of another estate," supposing she was a *feme sole*, that would not give her a right to retain the estate so given to her without performing the condition of paying the £300 a year out of some other estate; nor would it deprive the donee of the annuity of the right to say, "You shall not enjoy the estate without satisfying out of it my demand."

The evidence really comes to this. Mrs. Frazer's evidence is positive and plain. Mr. Frazer, whose conduct seems to have been frank and honorable and fair in every respect, was pressed in the cross-examination, and asked whether his wife did not make the promise, and whether his recollection did not enable him to say that she did so in his presence. Upon being asked further, he says, "I do not believe that I ever assented or dissented." Then, when he is asked, "Will you swear that you did not assent?" there being only one subject to which his

attention was drawn, he says, "I will not swear that I did not assent." Mr. Swanston has said very fairly that the *onus* in all such cases is upon the claimant. He has read, particularly from Lord Westbury's judgment in *McCormick v. Grogan* (¹), the conditions as to what the court has to see proved before it admits any such claim, and he says it must be proved that there was direct personal fraud, and that no personal fraud is proved, or even alleged, against Mr. Frazer. If the *statement made [331 by Mrs. Frazer be true, then a more direct, a more distinct personal fraud could not be committed than for Mrs. Frazer to refuse to perform that promise which she made to the testator upon his death-bed. So far, therefore, the *onus* is discharged.

The other point which is most to be considered, as it seems to me, is this: Mr. Frazer takes an interest under the will only subject to his wife's life interest. All the rest that he takes he takes by his marital right; that is to say, he takes what she could take. If she is bound by this trust, he can take nothing free from the trust, and it is imposing no obligation upon him by way of a promise — about which the evidence is anything but satisfactory so far as he is concerned — it is imposing no obligation upon him, because he made a promise to hold that which he cannot enjoy in virtue of his marital right — the estate of this testator — without performing that promise by which his wife was bound, and by which, therefore, as a consequence, he must be held to be equally bound, to the extent of his enjoyment of that estate. Now that, as it seems to me, disposes of the case, so far as this is a bill filed to have payment against both husband and wife out of the beneficial interest which they take under the testator's will. It is admitted by the wife that she is not entitled to it but upon performing the condition. The husband cannot dispute that. He cannot enjoy his wife's estate unless he performs the condition upon which it became hers. To that extent, therefore, I think the plaintiff has succeeded, and is entitled to a decree; but I cannot part with the case wholly upon that, and I will hear anything Mr. Eddis likes to say upon this part of the subject. It is plain, upon Mrs. Frazer's statements and cross-examination, and by her letters, and by every fact in the case, that this is her suit, although in the name of Miss Norris; that it is instituted by her, and that she is responsible for the costs of it if the defendant, Mr. Frazer, does not pay them. So that, although, as I have said, I think the plaintiff is entitled to a decree, it is a case in which it is impossible to give the plaintiff any costs. The decree must be made upon the ground I have mentioned, and to the extent which the bill asks; that is to say, to make Mr. Willis' estate liable for

(¹) Law Rep. 4 H. L., 97.

332] the annuity of £300 a *year; but I must make that decree without giving the plaintiff any costs, although to that extent she nominally succeeds in this suit, which is Mrs. Frazer's suit. There will be a decree as prayed by the bill. [The bill also prayed relief in the event of Mrs. Frazer dying in the lifetime of Mr. Frazer, but his honor said it was not necessary that the decree should extend to that.] Upon the proposed decree for an account,

Mr. *Swanston* observed that Mrs. Frazer had been in the actual receipt of a very large portion of the estate, which really belonged by marital right to Mr. Frazer.

The VICE CHANCELLOR said he could not meddle with that. He could not reach so far.

Mr. *Swanston* observed that Mrs. Frazer appeared separately, and if the court should decide that one or both of the parties ought to pay the annuity, the decree ought to be made against both.

The VICE CHANCELLOR said he was making a decree only against the estate which came from Willis, of which Mr. Frazer was the sole owner.

Mr. *Swanston* said that the house, Lottery Hall, part of Willis's estate, was given to Mrs. Frazer to her separate use. It was said that she had sold it. He asked that the sale moneys should be taken into account.

The VICE CHANCELLOR said that she could not have sold the house without the consent of her husband, and he could not frame the decree in the way proposed. Mr. Frazer, however, would not be liable for more than the fund which was subject to this trust would yield.

Mr. *Russell*, for the executor of John Witt, asked that Mr. Frazer might be ordered to pay his costs, on the ground that the executor had a lien on the fund for such costs.

The VICE CHANCELLOR said he thought the costs of Mr Russell's client ought to be first paid out of the trust fund, whatever it was.

333] *The following are minutes of the order :

Declare that the income of the residuary real and personal estate of the testator, G. W. Willis, and of the investments thereof, for the time being payable to the defendant Georgiana Clara Frazer, or to the defendant Arthur B. Frazer in her right, was and is subject to a trust for paying to the plaintiff the annual sum of £300 during the joint lives of the plaintiff and the defendant Georgiana C. Frazer ;

Take an account of the income of such residuary real and personal estate received by the defendant Arthur B. Frazer since the date of the last payment of the annuity in 1865 ;

Take an account of what is due to the plaintiff in respect of the annuity since the date ;

Out of the amount of the income so received by the defendant Arthur B. Frazer, let the costs of suit incurred by the defendant Witt be paid, and let the residue

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be paid to the plaintiff in or towards discharge of what is so found due to the plaintiff.

No other order as to costs.

Liberty to apply.

Solicitors for the plaintiff and for Mrs. Frazer : Messrs. *Clarke & Turner*.

Solicitor for Mr. Frazer : Mr. *William Clarke*, agent for Messrs. *Clarke & Howlett, Brighton*.

Solicitors for the executor : Messrs. *Shum & Crossman*, agents for Messrs. *Green & Moberly, Southampton*.

[Law Reports, 15 Equity Cases, 803.]

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[1870 B. 176.]

Company — Sale of Shares — Transfer to Infant — Vendor's Name on Register — Vendor a Trustee for Purchaser — Release and Indemnity.

Plaintiff, a registered owner of fifteen shares in a limited company, sold them through his broker on the London Stock Exchange, and 130 shares in the same company, which included the above fifteen, were bought by a broker on the Exchange, as agent for a firm of brokers in Scotland. The purchase money was paid, and the name of W K, of Aberdeen, described as an "Esq.," was furnished as that of the purchaser. A transfer deed of fifteen shares from the plaintiff to W K was executed by both parties, and registered, W K's name remaining on the register till the winding up, when it was found that he was a clerk in the employ of the Scotch firm of brokers, and an infant. The name of the plaintiff having been restored to the register, and settled on the list of contributories, as the owner of fifteen shares, and calls having been made, he filed a bill against the Scotch brokers, who, by their answer, disclosed the names of four persons, their principals, D, E, J, and S, as the purchasers of thirty, forty, thirty, and thirty shares respectively in the company, which, however (except as to E's forty, which did not include the plaintiff's fifteen), had not been appropriated.

Upon bill by amendment against the brokers and D, J, and S, praying *for [364 a declaration that the fifteen shares were held by the plaintiff as a trustee for D, J, and S, and for release and indemnity.

Held, that the plaintiff was a trustee of the fifteen shares for the defendants D, J, and S, and release and indemnity of the plaintiff by the defendants ordered as prayed.

MOTION FOR DECREE. The plaintiff, Thomas Davy Brown, in May, 1864, was the registered owner of fifteen numbered shares (of the nominal value of £100 each, upon which £3 had been paid up) in the contract Corporation, Limited. In June, 1864, the plaintiff, through his broker, sold fifteen shares on the London Stock Exchange for delivery on the 15th of June.

On the 6th and 7th of June, 1864, the defendants, James Black and Alexander Stephen, of Aberdeen, brokers, through their broker, James Pope Kitchin, of London, bought on the London Stock Exchange 130 shares in the same company. The result of the transactions was that the plaintiff's fifteen shares

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were included in the 130 bought by Black and Stephen. Bought notes in the names of Black and Stephen, as purchasers, were sent, and Kitchin returned as the name, description, and address of the purchaser, "William Keith, Esq., 23 King Street, Aberdeen." This name was inserted in a draft deed of transfer, in consideration of £75, of the fifteen numbered shares from the plaintiff to Keith, and the deed was duly executed by both parties, and registered.

On the 23d of April, 1866, the company was ordered to be wound up; the name of Keith was settled on the list of contributories, but the liquidator, upon inquiry, found that he was an infant, then about seventeen years of age, and a clerk in the employment of Black and Stephen. His name was thereupon removed from the register and list of contributories, and that of the plaintiff restored in respect of the fifteen shares. Shortly afterwards an order was made upon the plaintiff for payment of a call under which he became liable to pay £1425.

In November, 1869, Kitchin wrote to Black and Stephen, asking them to give the names of their principals, otherwise he should be compelled to give in their names to be substituted for 365] Keiths'. *In answer, Black and Stephen wrote to say the company had accepted Keith as a purchaser, and must abide by the selection they then made; and that it had been laid down that unless an objection was taken to a buyer's name within ten days, the seller of stock lost all remedy against any other person. The bill was filed on the 8th of June, 1870.

On the 4th of November, 1870, Black and Stephen answered, and said that the 130 shares were bought for the following principals: thirty share, for William Smith Dixon; forty for Robert Easson; thirty for Andrew Jopp; and the remaining thirty for the private account of the defendant Alexander Stephen; also that the forty shares so purchased for Easson had been since sold and transferred by Keith; but that no appropriation of the remaining ninety shares had been made among defendant's principals. The forty transferred shares did not include the plaintiff's fifteen.

The bill was amended on the 24th of January, 1871, and as amended was filed against Black and Stephen, Dixon and Jopp; and prayed that it might be declared that the fifteen shares had been since the 14th of June, 1864, and still were, held by the plaintiff as trustee for the defendants Dixon, Jopp, and Stephen, and that accordingly these defendants, as well as the defendant Black, "by reason of the part which he took in the aforesaid contrivances," were bound to procure the release or discharge of the plaintiff from the payment of all calls which since the 14th of June, 1864, had been made, or might there-

after be made, on such shares, and all interest in respect of such calls; and further to indemnify the plaintiff against all costs, damages, and expenses in respect of such calls, or otherwise in respect of the fifteen shares: and that the defendants might be ordered to procure such release or discharge accordingly.

The defendant Dixon answered on the 17th of May, 1871. He said that in 1864 he instructed Black & Co. to purchase for him some shares in the company, and to sell the same as soon as they should reach an advance price. Being already a shareholder to a large extent in the company, and having been a director, he did not wish it to be known that he was dealing in its shares; and *accordingly he told the firm, or as- [366] sented to their suggestion, that if it should be necessary to take a transfer of any shares they might purchase for him, they should take the transfer into the name of a fit and proper person, "as trustee" for him, who would deal with the shares according to the direction of the firm, acting under his instructions. He said he knew nothing of Keith, and had never before heard of his name. He denied that the transfer to Keith was executed pursuant to any directions of his. He had no reason to doubt that any consideration money payable in respect of the shares was debited by Black & Co. to his account. No appropriation of any of the ninety shares had been made to him, and no distribution of any of them had been made amongst him and any other persons. He then said, "Under the circumstances hereinbefore appearing, I submit and humbly insist that I was not at the time of the said purchase down to the sale of the forty shares in the bill in that behalf respectively alleged, or at any time, interested in the said fifteen shares, or any of them, as the true beneficial owner, or the owner of them; or that I have ever since such sale been, or am now, the true beneficial owner, or the owner, of the same or any of them." He denied that the plaintiff, "under the circumstances herein set forth," or in the bill alleged, or in fact, became as from the 14th of June, 1864, or any other time, or still was, a trustee of the fifteen shares, or any of them, for him; or that he was bound in equity to indemnify the plaintiff. He said that, "assuming and without admitting that any of the said 130 shares were bought by the said firm under my said instructions, the terms of the contract between the plaintiff and the said firm . . . show, as I insist, that it was the intention of the parties thereto that the said firm should be treated as principals in the transactions, and the plaintiff is not at liberty to treat me as a principal therein;" and he repudiated all liability in respect of the fifteen shares. It was proved that dividends had been received, and calls, prior to the winding-up, paid upon the shares, by

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and on behalf of the parties other than the plaintiff. All the defendants were residing out of the jurisdiction. The defendant Jopp filed an answer, but none of the defendants appeared, except Dixon.

367] *Mr. Eddis, Q.C., and Mr. J. W. Chitty, for the plaintiff: The right of the plaintiff to relief, and to relief in this form, is established by *Custellan v. Hobson* ⁽¹⁾.

Mr. Kay, Q.C., and Mr. Cobbold, for the defendant Dixon: The agents Black and Stephen exceeded their authority. The defendant Dixon did not authorize the use of the name of this infant; and he is not bound by the wrongful act of his agents: *Udell v. Atherton* ⁽²⁾. The only authority on the other side is *Custellan v. Hobson*. But in that case there was a contract. The man whose name was furnished as the purchaser was not an infant; he was a man of straw, no doubt, but not a person incapable of entering into a contract. The distinction is marked by Lord Justice Melish in his judgment in *Merry v. Nickalls* ⁽³⁾. *Shepherd v. Gillespie* ⁽⁴⁾ also applies. The plaintiff does not attempt to allege that he sold these particular fifteen shares to the defendant Dixon. His allegation amounts to this: "I and a number of others joined in selling to an infant named Keith." That contract has failed, and he must take the consequences. There never was a contract which could be distributed between us, Dixon, Easson, Jopp, and Stephen; and without a contract the plaintiff cannot reach either of us. He must seek his remedy against the brokers who were the wrongdoers, either through his own brokers, according to *Paine v. Hutchinson* ⁽⁵⁾, or directly, as if Black and Stephen had been jobbers, as in *Merry v. Nickalls* ⁽⁶⁾. [They also referred to *Cruse v. Paine* ⁽⁷⁾; *Gooch's Case* ⁽⁸⁾; *Thompson v. Davenport* ⁽⁹⁾; *Smith v. Anderson* ⁽¹⁰⁾.]

SIR JAMES BACON, V.C.: Mr. Eddis, I will not trouble you to 368] reply. It is a relief to me *to find that *Merry v. Nickalls* ⁽⁶⁾ has nothing to do with the present case. I take that upon my own conviction and upon your representation, otherwise I should have paused before I pronounced any decision upon it. I am glad also to find that that which was embarrassing in *Merry v. Nickalls* to a certain extent, finds no place in this case—I mean the intervention of a jobber and the effect of the construction of the rules laid down by the Stock Exchange for regulating their business.

⁽¹⁾ Law Rep., 10 Eq., 47.

⁽²⁾ 7 H. & N., 172.

⁽³⁾ Law Rep., 7 Ch., 733, 752.

⁽⁴⁾ Ibid., 8 Ch., 764.

⁽⁵⁾ Ibid., 388.

⁽⁶⁾ Ibid., 7 Ch. 733.

⁽⁷⁾ Law Rep., 6 Eq., 641.

⁽⁸⁾ Law Rep., 14 Eq., 454; Ibid. 8 Ch., 266.

⁽⁹⁾ Sm. L. C., 6th Ed., vol. II., p. 212, 218.

⁽¹⁰⁾ 7 C. B., 21.

The case before me, when the real substance of it is considered, is as plain and simple a case as can be stated. The owner of shares desires to sell them upon the Stock Exchange, people present themselves there to buy, and the shares are sold and paid for — the goods are delivered. All that remains to be done is that the name of the person to whom the transfer is to be made should be furnished. That is done. The name is furnished, the transfer is executed, and the name of the purchaser is registered. The transaction there comes to an entire and complete end. Then at a later period it is discovered that the brokers, the persons in Scotland who had commissioned the broker in London to buy for them, have furnished the name of an infant, and that the registration is a mere nullity so far as he is concerned, and that, therefore, as between the company and the creditors of the company, and the liquidator in the winding-up, Mr. Brown, the original owner is still the owner of the shares. Brown is entered upon the list accordingly to bear his share of the liability and the responsibility which attach to the character of a shareholder. He is the owner of the shares; that is to say, he is the legal owner of the shares which he has sold, and for which he has been paid, and in which he has no interest whatever. A great burden attaches to them, but they are not his. The next question that presents itself is — Whose, then, are they? They are the shares of the person who bought and paid for them. Who are they? The Scotch broker in the first instance. But by their answer, and by the answer of Mr. Dixon (whose case alone I have heard argued), it is as clear that they were sent into the market in London to buy, on behalf and as the agents of Mr. Dixon and other persons, certain shares, as that they did buy them and pay for them. Mr. Dixon's answer *puts that beyond the possibility of doubt [369 or question. The others are equally clear. He says in the sixth paragraph of his answer, "Some time in the year 1864 I gave instructions to the firm whom at the time I generally employed as my brokers, to purchase for me some shares in the said company, and sell the same as soon as they should reach a price in advance of that at which they should be bought," and so on; "but I desired that my own name should not appear." The question of principal and agent, therefore, is raised upon that statement, and there is abundance of other evidence and statement leading to the same conclusion. It is clear that the Scotch brokers were the regularly constituted agents for Mr. Dixon and other persons, to go and buy for them upon the stock Exchange, and pay for the shares that they desired to acquire.

Mr. Kay refers me to the case of *Udell v. Atherton* ('). The

(') 7 H. & N., 172.

principle there laid down is one which is perfectly well understood, namely, that an agent cannot act so as to bind his principal beyond the scope of the authority which has been conferred upon him. But here the act performed by the agent was precisely within the authority which was conferred upon him; and from the moment when the purchase was completed the shares belonged to the purchaser, no matter in whose name they were registered. Mr. Dixon desired that his name, of all others, should not be used. But what did it signify to Mr. Dixon in whose name they were? Whoever held them held them as trustee for him, whether he was under age or adult. They were his shares, he had paid for them, his agent had bought them within the scope of that agent's authority, and they are his. I do not perceive where the difficulty of the case is. In *Merry v. Nickalls* ⁽¹⁾ there was plenty of difficulty. *Castellan v. Hobson* ⁽²⁾ presented difficulties of another kind. There is no difficulty in this case. The shares were bought upon the day mentioned, paid for on the day that all parties agreed upon, registered in the name furnished, but so registered as that that transaction was null; and they remain, therefore, registered in the name of the present plaintiff, who has no more interest in them than any person who is now listening to me. Can there be any doubt that upon 370] principles *universally established, the transaction being such as I have mentioned, the plaintiff is only a trustee of these shares? Can there be any doubt that he is a trustee for the persons whose money bought and paid for them?—whether by their own hand or through an agent is perfectly indifferent. That is the real state of the case; and the question which arose in *Castellan v. Hobson* ⁽²⁾ has nothing whatever to do with this case, except that there the trusteeship was established, as appears by the judgment of Lord Justice (then vice chancellor) James, and relief was accordingly given.

The facts of the case do not stop with the observation I have last made, because the transaction was so fully completed, as that when dividends came to be paid upon these shares—while dividends were payable—they were made in the regular course and paid, I do not say into Mr. Dixon's hands, but to Mr. Dixon's agent on his account. That is proved in the case. The passage from Mr. Dixon's answer which was read does not in the slightest degree call that in question, because what he says upon that is this—it is very ingenious and cautious no doubt—"I did not provide, in the first instance, any consideration money for any shares bought for me under my said instructions, but I have no reason to doubt that any consideration money payable in respect of such shares was debited by the said firm to my ac-

⁽¹⁾ Law Rep., 7 Ch., 733.

⁽²⁾ Law Rep., 10 Eq., 47.

count, and paid or allowed by me in the adjustment of accounts between us." As to the receipt of dividends, the answer is not quite as distinct, although I can pay very little attention to an answer in which I find every sentence beginning with "Under the circumstances," evading the real question which is put to the defendant, and not telling the story as one would expect a respectable man to tell his story, even if it were against his own interest. That the dividends were paid is proved in evidence; that calls were made and that calls were paid is proved in evidence. Everything substantial is proved in this case, and nobody can doubt that from the day upon which, in 1864, Mr. Dixon's agent (I mention his name only because his case, and his only, has been argued) bought and paid for these shares, Mr. Dixon was the true owner of these shares, as he is up to this moment.

Then it is said that there is great difficulty in this case because *there has been no appropriation. Mr. Dixon has not [371] had any shares appropriated to him, and the other defendants have not had any shares appropriated to them. What does that signify? The mass remains. The entire number of shares is there. There is no question whatever about it. What does it signify to the plaintiff in what proportions the defendants are entitled, since it is proved that among them they, and they only, are the persons beneficially entitled to the shares? In my opinion the plaintiff is entitled exactly to that relief which he prays for by his bill. He is entitled to a declaration that he is a trustee, and a trustee only, for the persons whose money bought and paid for these shares; he is entitled, notwithstanding the contrivance that was resorted to, to have "a release and discharge from all calls which, since the 14th of June, 1864, have been made or shall be made in respect of such shares, and to be indemnified against all future costs, damages, and expenses;" and he is entitled, in my judgment, also to have the costs of this suit up to the present time. When the defendant says to the plaintiff, "I cannot tell you which share is mine and which belongs to somebody else," that is matter of perfect indifference. The plaintiff desires only to be indemnified in respect of fifteen shares, and since by the "contrivance," I use the expression that I find in the prayer of the bill which I have just read, the defendants are not able to say which shares are theirs, the plaintiff is under no obligation to say which shares are theirs, nor in what proportions they are entitled to that number of shares, ninety I think in number, which now remain upon the books of the company.

Solicitors for the plaintiff: Messrs. *Linklater, Hackwood, Addison, & Brown*.

Solicitors for the defendant *Dixon*: Messrs. *Patteson & Cobbold*.

[Law Reports, 15 Equity cases, 372.]

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*HIBBERT v. HIBBERT.

V.C.B. March 8, 1873.

[1870 H. 2.]

Will—Construction—Relations.

Testator, after giving legacies to various persons, describing their relationship, including a person described as his niece, but in reality illegitimate, and persons connected by affinity, directed that if the whole of his property made more than the whole amounts mentioned in his will, it should be divided "amongst my relations in proportion to their separate amounts:"

Held, that only such of the legatees as were blood relations were entitled under the residuary gift.

JOSEPH STAFFORD, by his will, dated the 2d of November, 1869, after giving to the children of his nephew Robert Hibbert certain specified legacies, gave "to my niece Thirza Johnson, wife of Samuel Johnson, or their heirs, the sum of £400. I also give and bequeath to my niece Sarah Pearson, wife of George Pearson, as she is not likely to leave any issue, £100. I also give and bequeath to my niece Eliza Phillips, wife of William Phillips, or their heirs, the sum of £400; to my niece Joseph Stafford's widow and two children John and Joseph the sum of £600; to Rachel Simister, wife of William Simister, daughter of my nephew Daniel Bradbury, he being deceased, or their heirs, the sum of £300; to Betty Wood, wife of James Wood, daughter of my nephew Daniel Bradbury, as aforesaid, or their heirs, the sum of £300; to John Beard who married my niece Mary Ann Hibbert, but is dead without leaving any issue, the sum of £100." After some other bequests and directions, the will proceeded: "If the whole of my property makes more than the whole amounts mentioned in this my will, I request it to be divided amongst my relations in proportion to their separate amounts." All the testator's next of kin were amongst the legatees named in the will.

With respect to the persons mentioned in the will, it appeared that testator had a sister Anne Stafford, who was married to Joseph Hibbert, by whom she had issue Robert Hibbert, Mary Ann, wife of John Beard, and Sarah, wife of George Pearson. In March, 1813, Joseph Hibbert was convicted at the Derby [373] assizes of *burglary, and sentenced to be transported for life. In 1822, when Joseph Hibbert was alive, though not known by his wife to be so, Anne Hibbert went through the ceremony of marriage with Joseph Mellor. They had three children, Caroline, Thirza, wife of Samuel Johnson (described in the will as "my niece Thirza Johnson"), and Eliza, wife of William Phillips ("my niece Eliza Phillips, wife of William Phillips"). Joseph Stafford, son of a deceased brother of the testator, left a widow (described as "my niece Joseph Stafford's

widow"). It also appeared that Daniel Bradbury, the father of Rachel Simister and Betty Wood, was an illegitimate son of Rachel Bradbury, a deceased sister of testator's wife. The question now raised upon further consideration in a suit to administer the testator's estate was, who were entitled to take under the residuary gift: whether 1, those only amongst the legatees who were blood relations; or 2, all the persons described as relations without reference to legitimacy or blood relationship; or 3, only the next of kin.

Mr. Kay, Q.C., and Mr. Finch, for plaintiffs John and Joseph Hibbert, sons of Robert Hibbert, and executors, contended that the gift of the residue to the testator's relations was confined to such as would take under the Statute of Distributions, and did not include the illegitimate children of relations, or persons not related in blood: *Thomas v. Hole* (1). The erroneous description of a person in one part of the will as a relation — here as "my niece" — would not enable such person to take as if she belonged to a class which was designated by the like description in another part of the same will: *Smith v. Lidiard* (2); *Thompson v. Robinson* (3); *In re Standley's Estate* (4).

Mr. Little, Q.C., and Mr. Bardswell, for Robert Hibbert, another son of testator's nephew Robert Hibbert, supported the argument of plaintiffs, and contended that the gift was confined to relations in blood.

Mr. J. W. Chitty, for Mr. and Mrs. Johnson: Although in construing the residuary gift the word "relations" *means [374 *primâ facie* those only who are legitimate, this presumption is rebutted where the intention to use the word in a different sense clearly appears on the face of the will. By describing in the previous part of the will both Thirza Johnson and Sarah Pearson by name as "my nieces" (or relations) this testator has clearly shown his intention that they were to be included in the subsequent gift of the residue "amongst my relations," the rule being that a subsequent gift to relations, children or nephews or nieces, will be construed to mean the same persons as were described by that title in a previous part of the will: *Hartley v. Tribber* (5); *James v. Smith* (6); and on that principle the word "children" has been held, by force of the context, to carry the property to a class including both legitimate and illegitimate children: *Evans v. Davies* (7); *Meredith v. Farr* (8); *Owen v. Bryant* (9); *Worts v. Cubitt* (10), *Crook v. Hill* (11); in which case

(1) Cas. t. Tal., 251.

(2) 3 K. & J., 252.

(3) 27 Beav., 486.

(4) Law Rep., 5 Eq., 304.

(5) 16 Beav., 510.

(6) 14 Sim., 214.

(7) 7 Hare, 498.

(8) 2 Y. & C. Ch., 525.

(9) 2 D. M. & G., 697.

(10) 18 Beav., 421.

(11) Law Rep., 6 Ch., 311.

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the strictness of the rule laid down in *Pratt v. Mathew* ⁽¹⁾, that illegitimate children could not take under the same class gift with legitimate children, was disapproved of. The evidence in this case shows that the testator always treated Thirza Johnson and Eliza Phillips as his legitimate nieces, and that they were so regarded generally.

Mr. *Russell Roberts*, for the next of kin: In the absence of strong words plainly showing a contrary intention, the word "relations" will be construed to mean next of kin according to the Statute of Distributions. This limitation of the term has been adopted to avoid the uncertainty and inconvenience that must otherwise arise from every person who could make any claim coming in: *Thomas v. Hole* ⁽²⁾; *Whithorne v. Harris* ⁽³⁾; *Green v. Howard* ⁽⁴⁾; *Rayner v. Moubray* ⁽⁵⁾. It would be going out of the rule to construe "relations" as including illegitimate relations.

Mr. *Macnaghten*, for the heir-at-law.

375] *SIR JAMES BACON, V.C.: There is no rule in cases of this description except to construe the will so as to give effect to the intention of the testator as expressed by the words he has used. It is perfectly clear that the word "relations" standing by itself would mean next of kin; but the question is, what intention am I to ascribe to the testator on the words that he has used? Having a quantity of persons in his mind, the testator gives legacies to these persons, some of whom are his relations in the proper sense of the word, and some of whom are not. Then, by way of winding up his will, he gives this direction, "If the whole of my property makes more than the whole amounts mentioned in this my will, I request it to be divided amongst my relations in proportion to their separate amounts." The gift of the residue is to those persons who alone answer the description of his relations in the proper sense of the word. If it were necessary to refer to authorities, *Smith v. Lillard* ⁽⁶⁾, which shows that the circumstance that the testatrix had in her will given legacies to several persons, describing each as "my niece," did not enlarge the meaning of the words "nephews and nieces" in the residuary bequest so as to make it include two legatees whom she had called her nieces in the will, but who were in fact nieces not of the testatrix but of her late husband, is directly applicable to this case. It is not the province of the court to speculate or consider what the testator would by strangers be supposed to have meant. No other meaning can be ascribed to the residuary gift than that the residue

⁽¹⁾ 22 Beav., 328.

⁽²⁾ Cas. t. Tal., 251.

⁽³⁾ 2 Ves. Sen., 527.

⁽⁴⁾ 1 Bro. C. C., 81.

⁽⁵⁾ 3 Ibid., 234.

⁽⁶⁾ 3 K. & J., 252.

was to go to such of the legatees as were blood relations in the proportions of the legacies already given to them. As to Thirza Johnson, she must, on the evidence, be taken to be illegitimate, and will not share in the gift of residue.

Solicitors: Messrs. *Chester, Urquhart & Co.*; Messrs. *Wilkins, Blyth & Marsland.*

[Law Reports, 15 Equity Cases, 376.]

V.C.B. March 18, 19, 1873.

*BIGG V. CORPORATION OF LONDON.

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[1870 B. 113.]

Compensation—Public Body—Remote Injury.

A public body, with power by act of parliament to stop up, alter, or use, for the purpose of the authorized works, certain specified streets, were restrained by injunction from interfering, in excess of their powers, with the cellar of a house in one of the streets, the roadway of which was being lowered, until the amount of compensation for the whole house should have been ascertained and paid. An inquiry as to the damages sustained by plaintiffs, the owner and occupier of the house, by reason of the works commenced by defendants, having been directed by the decree:

Held, that plaintiff was not entitled to be compensated for the indirect injury to his trade, resulting from the diversion of traffic caused by the authorized act of lowering the roadway, but only for direct structural injury occasioned by the unauthorized interference with his cellar.

ADJOURNED summons on an application on the part of the defendants that the chief clerk's certificate, dated the 6th of November, 1872, pursuant to the decree of the 23d of January, 1872, should be varied by the omission of certain items of the schedule to such certificate. Under the Holborn Valley Improvement (Additional Works) Act, 1867, which incorporated the provisions of the City Improvement Act, 1847 (regulating the mode of serving notice to treat, and assessing compensation for lands within the city taken otherwise than by agreement), and of the Lands Clauses Act, 1845, "except the provisions with respect to the purchase and taking of lands otherwise than by agreement," the defendants were authorized to execute certain specified works, including "the stopping up and permanent appropriation, or the alteration, adoption, or use, for purposes of this act, of all or any part of the streets, courts, ways, passages, alleys, squares, yards, and places" therein mentioned, including Thavies Inn; but no power was given to them to cut through or interfere with cellars under the roadways to be lowered or altered under the provisions of the act, without serving notice to treat, and ascertaining the compensation for the houses to which such cellars belonged.

*The plaintiffs, Bigg and Adkins, were lessor and lessee [377]

of 4 Thavies Inn, where the business of a silversmith was carried on by Adkins. In the course of their operations, defendants, the corporation, found it necessary to alter the level of part of Thavies Inn by lowering the foot and carriage way, for the purpose of making a proper junction with the Holborn Viaduct; and in carrying out this operation they had, without any notice to treat for plaintiffs' house, or offer to assess compensation for it, excavated a large trench, five feet wide, along the roadway of Thavies Inn, extending throughout the whole length of plaintiffs' cellars, which were left open and exposed, and, as the bill alleged, thereby endangering the stability of plaintiffs' house.

On the 14th of April, 1870, the bill was filed for the purpose of restraining the corporation from remaining in possession of the cellars of plaintiffs' house (4, Thavies Inn), and from continuing to prosecute their works through the cellars or any other part of plaintiffs' house, until the purchase money or compensation to be paid by defendants in respect thereof, should have been duly ascertained and paid. The bill also prayed that the defendants might be ordered to reinstate plaintiffs' cellars, and restore them to the state and condition in which they were previously to the commencement of defendants' works, and to pay to plaintiffs damages to be assessed by the court for the injury sustained by them through those works.

At the hearing of the cause, on the 23d of January, 1872, the court being of opinion that the corporation, in carrying out the works authorized by the act of 1867, had exceeded their powers by cutting through plaintiffs' cellar without taking their house, a decree was made for a perpetual injunction, until, etc., as prayed by the bill, with costs to be paid by defendants, "and in case the parties differ as to the amount of damages to be paid to plaintiffs by the defendants," an inquiry—"what damages the plaintiffs have sustained by reason of the works commenced by the defendants as in the plaintiffs' bill mentioned"—was ordered.

On the 1st of November, 1872, in pursuance of this inquiry, the chief clerk certified that £170 was the amount of the damages plaintiffs had sustained by reason of the works commenced [378] *by defendants, the particulars of such damage being thus stated: "1. For loss sustained by reason of certain portions of the stock-in-trade of plaintiff, II. Adkins, requiring re-silvering and cleaning, in consequence of the effluvium caused by defendants' works, and by reason of the deprivation of the use of their cellars and the loss of some coals therefrom, £50. 2. For bills paid by plaintiff II. Adkins for the reconstruction of the cellars of the plaintiffs' house, £70. 3. For the sum neces-

sary to be expended in order to place plaintiffs' house in a proper habitable condition, £70. 4. For depression of the trade carried on by the plaintiff H. Adkins caused by the defendants' works, £150."

In reference to the 4th item, evidence was given on behalf of the plaintiffs before the chief clerk that the effect of defendants' operations, by suspending all carriage traffic into and out of Thavies Inn, had been such as to depress the trade, and cause great inconvenience and obstruction to the various businesses there carried on; and in particular that Adkins' books showed a loss of profit in his business of £300, and that former customers, finding a difficulty of access by reason of defendants' works, had ceased to give him their orders.

Mr. Kay, Q.C., Mr. Miller, Q.C., and Mr. A. T. Watson, for the defendants, in support of the summons to vary the certificate: The evidence does not show with sufficient distinctness that any such damage as is alleged by plaintiffs has been sustained. But in any case the allowance of such an item is contrary to the law, as laid down in *Ricket v. Metropolitan Railway Company* (¹), that a mere temporary obstruction, occasioned by the performance of a public work authorized by parliament, gives no right of compensation to the person whose trade has thereby sustained loss. In this case the defendants had power under their act to lower or alter the level of the roadway in Thavies Inn, so as to give access to the Holborn Viaduct, and in carrying out this work they *exceeded their powers by [379 cutting into plaintiffs' cellar. The plaintiffs filed their bill, complaining of structural damage but not of injury to their trade, and an injunction was granted to restrain defendants from touching plaintiffs' house in excess of their powers. For that structural damage the plaintiffs have been declared entitled by the decree to compensation, but they are not therefore entitled to compensation for the interference with their business occasioned, not by the unlawful act of cutting through their cellar, but, indirectly, by the lawful act of lowering the roadway, which had the temporary effect of stopping carriage traffic. According to plaintiffs' case, the injury to the business has been caused by the interference with the carriage traffic, and would have been the same if we had strictly confined ourselves to our parliamentary powers, and stopped up Thavies Inn without touching their cellar; and even assuming that the injury was one for which compensation could have been obtained, it does not arise out of the wrongful act of the corporation so as to give him a right against them. But in any case the injury on which the claim to compensation is founded is too remote to be the subject of

(¹) Law Rep. 2 H. L., 175; 5 B. & S., 149.

an action; and unless the plaintiff, independently of the Railway Clauses Act, and supposing it had never passed, could have maintained an action for the alleged interference with his business, he cannot since the passing of that act — which gives no new right but only a new remedy — obtain statutory compensation: *Rickett v. Metropolitan Railway Company* ⁽¹⁾; *Hammersmith Railway Company v. Brand* ⁽²⁾; *City of Glasgow Union Railway Company v. Hunter* ⁽³⁾. Even if there had been a wrongful obstruction of the highway of Tavies Inn, plaintiffs would have had no ground of action for damage so remote as depression of their trade occasioned by interruption of carriage traffic; “and it seems unreasonable that an obstruction which created no cause of action either for the plaintiff or for the travelers separately, should by indirect consequence become a cause of action to the plaintiff because the travelers exercised their choice as to their path and as to their refreshment, a choice in which the plaintiff had no manner of legal right:” *Per Erle, C.J., in Rick-380] ett v. Metropolitan *Railway Company* ⁽⁴⁾. We submit, therefore, that the chief clerk has given the plaintiffs damages to which they are not entitled, and this item of compensation for “depression of trade” must be struck out of the certificate.

Mr. Amphlett, Q.C., and Mr. Phear, for the plaintiffs: If a person has, by the operations of a public body or company, sustained an injury which has caused a loss of his business, it is idle to contend that he is not entitled to compensation. We have established the fact of special injury, and an inquiry has been granted as to damages in respect of that special injury, which will include not only the structural damage, but the damage to our trade, which has been occasioned by the wrongful act of defendants: *Wilkes v. Hungerford Market Company* ⁽⁵⁾ is a direct authority that a shopkeeper, who has suffered loss in his business in consequence of passengers having been diverted from coming to his shop by the works of a company, is entitled to recover; and again, in *Glover v. North Staffordshire Railway Company* ⁽⁶⁾, an interruption to a man’s performance of his business has been held to give him a right to compensation in respect of his land being injuriously affected within the meaning of the Lands Clauses Act; and, as was said by Mr. Justice Wightman in that case, “Suppose no act of parliament had passed, and that had been done which has been done, would an action have been maintainable? I think it would.” Supposing a company, with power to block up the whole of a public street, had, instead of stopping the whole street, blocked up all access to one particu-

⁽¹⁾ Law Rep., 2 H. L., 175.

⁽²⁾ Law Rep., 4 H. L., 171.

⁽³⁾ Law Rep., 2 H. L., Sc., 78.

⁽⁴⁾ 5 B. & S., 160, 161.

⁽⁵⁾ 2 Bing. N. C., 281.

⁽⁶⁾ 16 Q. B., 912, 924.

lar house, would not that be a special damage for which the owner of the house could recover? If, as in this case, they not only block up the access to the house, but cut a trench through the cellar in front of the house, the case for compensation is still stronger, and we submit that the plaintiffs are entitled to recover, not only for the direct structural injury, but also for the injury to the business resulting from the works of the defendants, which have been carried out in excess of their powers.

*Mr. Kay, in reply.

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SIR JAMES BACON, V.C., after adverting to other points in the case not material for this report, continued: The decision in the house of lords (*Ricket v. Metropolitan Railway Company* ⁽¹⁾) has gone far to settle the law in such cases; but to settle it as persons, who are not bound as we are, would not consider the most satisfactory mode, viz., that remote and consequential damages cannot be claimed. The case I have to deal with here is that of a corporation, who are entitled to lower the surface the surface of the ground in Thavies Inn. That power is given to them by statute, and it cannot be questioned. In the course of doing it they inflict an injury and wrong upon the plaintiffs, and for that they are required to make compensation, and the amount of compensation for that injury is assessed, and is not in dispute. But then it is said that besides that the plaintiff Adkins is entitled to charge something for the loss which he may have sustained in his trade. Nothing can be more imaginary than the loss in the way it is stated. It is because customers of his could not have their usual access to his house that he says his trade has been depreciated. There is not, strictly speaking, a particle of evidence that his trade has been in any degree depreciated; and it is clear that the plaintiff has no particular injury to complain of, as all the inhabitants of Thavies Inn would have as good a right to complain that their customers could not get access to their houses. That the level of the street was lawfully changed is beyond all possibility of dispute. That the compensation is made to the plaintiff for all that he can claim in respect to direct injury is also not in dispute; and under these circumstances, as I find it totally impossible to sever that lawful lowering of the street from that other lowering of the street which took place when the plaintiff's cellar was invaded, how can I say that the want of access to his premises has been occasioned by that which was wrongful, any more than that it was occasioned by that which was rightful? Looking at the position of the street as described in the evidence, there must of necessity, from *the nature of the works, be an [382 interruption to the traffic in Thavies Inn. If the plaintiff could

(1) Law Rep., 2 H. L., 175.

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sever the damages which are properly attributable to the interference with his cellars from the damages occasioned by the interference with the access to his premises, there would be difficulty enough on the authorities. Upon the case, however, as it stands, and upon the evidence of the witnesses, bearing in mind the power which the legislature has given to the corporation to disturb, lower, or alter the level of the roadway in Thavies Inn (subject to their not doing such injury as they did to the plaintiffs' cellar), I consider that there is no reason for damages being assessed for any such alteration of the roadway. Not one of the authorities referred to, in my opinion, justifies it. Having read very carefully the decision of Chief Justice Erle in *Ricket v. Metropolitan Railway Company* (*), I find no grounds upon which I can say that such injury as may have been sustained by the plaintiff Adkins, on the score of his trade having been depreciated, justifies the claim which is here made for damages, or that which the chief clerk in his certificate has allowed. The certificate must, therefore, be varied by omitting the 4th item.

Solicitors: Messrs. *Prior, Bigg, Church & Adams; The City Solicitor.*

S. P. Coster v. Mayor, etc., 43 New York Rep., 399.

[Law Reports, 15 Equity Cases, 383.]

L.JJ. for V.C.W. Feb. 18, 1878.

383] *In re DAVIDSON'S SETTLEMENT TRUSTS.

Settlement—Fund in Court—Insolvency in Australia—Petition by Official Assignee at Brisbane—Domicil of Insolvent.

W. D. who had settled as a grazier in Australia, and had upon his own petition, been adjudicated an insolvent, and received his certificate there, afterwards visited England in 1868, and died there intestate, leaving a widow in Australia and creditors who had received only a small dividend on their debts. Under a settlement made on the marriage of the father and mother of W. D. the father, who died in 1869, had power to appoint a fund amongst his children, who, in default of appointment, were entitled equally. The power was not exercised. W. D.'s share of the fund had been paid into court. On a petition by the official assignee in the insolvency, it was held that he was entitled to the fund in court.

In re Büthman (*) discussed.

ON the marriage of the parents (English, and residing in England) of Walter Davidson a settlement was executed. The sum of £20,000 was vested in trustees upon trusts for the children of the marriage as the settlor should appoint, and in default of appointment, for the children equally. There were five children of the marriage, including Walter Davidson. He was born in

(*) 5 B. & S., 160, 161.

(*) Law Rep., 2 Eq., 23.

England, and resided there until 1851, when he went to Australia, and settled at Carabah, in the colony of Queensland, as a grazier. In 1858 he visited England, and returned to Australia in 1860. In 1867 he again visited England, and died there on the 7th of July, 1868, intestate, without issue, but leaving a widow and his father him surviving. The father died in July, 1869, without having exercised the power of appointment over the fund which represented the £20,000 which he had settled. After the death of the settlor the trustees paid four-fifths of the fund to the brother and sisters of Walter Davidson, and his share they subsequently paid into court under the provisions of the Trustee Relief Act.

On the 4th of December, 1866, Walter Davidson was, on his own petition, adjudicated, by the Supreme Court of the Colony of Queensland, an insolvent, and an official assignee was appointed. *Sittings under the insolvency were held on the [384 18th of December, 1866, and the 6th and 12th of February, 1867. Various creditors for small amounts proved their debts, and one creditor proved for £4894 17s. In consequence of the insolvent not having kept proper books of account, his certificate was in February, 1867, ordered to be suspended for twelve months.

On the 12th of March, 1868, an order was made by which the Supreme Court allowed the certificate.

The evidence showed that the total amount of the debts was £5236 3s. 3d., and that £205 17s. 8d., had been paid in dividends, leaving a balance of £5030 5s. 7d. still due to the creditors. The fund in court, with dividends, was £4305 7s. 8d.

This was a petition of Alexander Raff, of Brisbane, in the colony of Queensland, official assignee of and in the insolvent estate of Walter Davidson, late of Carabah, in the colony, grazier, deceased, claiming, under the 87th section of "an act to amend and consolidate the Laws for the Relief of Insolvent Debtors" (Queensland Statutes, 28 Vict. No. 25, dated the 12th of September, 1864), that all the personal estate and effects, present or future, wheresoever the same might be found or known, and all property which he (the insolvent) might purchase, or which might revert, descend, or be bequeathed or come to him before he should have obtained his certificate, had become absolutely vested in him, as such official assignee, for the benefit of the creditors of the insolvent; and praying that the fund in court (less the costs of himself and of all parties properly appearing as respondents) might be paid to him. No person had obtained a grant of letters of administration, but in the course of the hearing of the petition the Lord Justice James appointed the widow of the insolvent to represent his estate.

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Mr. Dickinson, Q.C., and Mr. F. O. Haynes, for the petitioner, stated the facts, and after referring to the case of *In re Blithman* ⁽¹⁾, submitted that he was entitled to the fund.

Mr. Greene, Q.C., and Mr. Walter Phillimore, for the widow, 385] *contended that this case was just like that of *In re Blithman* ⁽¹⁾. The domicile of this insolvent was English; but there ought, if that was disputed, to be an inquiry; and also, whether the claim for £4,894 17s. had been properly established under the insolvency.

They referred to *Re Stark* ⁽²⁾, *In re Garnier* ⁽³⁾, Burge's Foreign and Colonial Law ⁽⁴⁾, Phillimore on International Law ⁽⁵⁾, *Cook v. Sturgis* ⁽⁶⁾, *Ex parte Cook* ⁽⁷⁾, and *Jopp v. Wood* ⁽⁸⁾.

Mr. Karslake, Q.C., and Mr. Rawlinson, for the trustees.

Mr. Kenyon Parker, for a creditor, who now disclaimed.

Mr. Dickinson, in reply, submitted that the domicile of the insolvent was, upon the evidence, colonial at the time of his insolvency.

SIR W. M. JAMES, L. J.: I am of opinion, upon the facts in this case, that the petitioner is entitled to the fund in court, and it is not, in my view, necessary for me in determining that to consider what was the principle of the decision in *In re Blithman*. I have before me the trustees and the persons who have been appointed technically and formally to represent the estate, and I have to consider who has the best right to the fund. Whether the domicile of the insolvent was English or colonial, for the purposes of trading or otherwise, is immaterial. It seems to me that the proceedings under the insolvency in Queensland cannot be disputed by the representative of the insolvent, who became an insolvent upon his own petition, who voluntarily submitted himself to the Insolvency Court in the colony, and in whose lifetime debts were proved in the insolvency to a much larger amount than the sum in court will provide for. It is clear that neither the insolvent's representative nor his next of kin can have any legal right to anything until after the payment of all his debts, and a surplus here is only in *the 386] imagination. This case is totally different from *Cook v. Sturgis* ⁽⁶⁾, and the other cases which have been cited. It will be idle, on the facts before me, to direct further proceedings. The creditors who have proved are entitled to be paid, and the fund must be paid to the petitioner for distribution amongst them. If there be any real ground for disputing the large debt already proved, it must be disputed in the insolvency in Queensland.

⁽¹⁾ Law Rep., 2 Eq., 23.

⁽²⁾ 2 Mac. & G., 174.

⁽³⁾ Law Rep. 18 Eq., 532.

⁽⁴⁾ Vol. iii. p. 906.

⁽⁵⁾ Vol. iv., p. 547.

⁽⁶⁾ 3 De G. & J., 506.

⁽⁷⁾ 29 L. J. (Q.B.), 68.

⁽⁸⁾ 84 Ibid. (Ch.), 212.

L.J.J. for V.C.W.

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I may add that it would be impossible to carry on the business of the world if courts refused to act upon what had been done by other courts of competent jurisdiction; and the proceedings in the court at Brisbane conclusively show that the insolvent was largely indebted beyond the amount of the sum in question. I must order the costs of all parties to be paid out of the fund, and the balance to be paid to the petitioner.

Solicitors: Mr. *Child*; Messrs. *Walters, Young, Walters & Deverell*.

[Law Reports, 15 Equity Cases, 386.]

L. J.J. for V.C.W. Feb. 22, 1873.

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Will — Construction — Gift over — Lapse.

A testator gave to A B a legacy to be vested in him when and as he should attain the age of twenty-one years, or if he should die under that age leaving lawful issue at his death; and in case he should die without attaining a vested interest in his said legacy, the testator gave the legacy over to other persons. The legatee attained the age of twenty-one, and died in the testator's lifetime, leaving issue:

Held, that the gift over took effect.

A TESTATOR directed his trustees and executors to set apart a fund to produce £300 a year for his widow during her life, and on her death the fund was to fall into the residue. He then directed that four sums of money should be set apart and be held upon trusts for his four daughters respectively during their respective lives, with remainders to their husbands and children, and he bequeathed three legacies to his three sons respectively: "the said several legacies hereinbefore bequeathed to my said sons to *be vested in them respectively when and as they [387 shall respectively attain the age of twenty-one years, or if they should die under that age leaving lawful issue at their respective deaths; and in case any one or more of them shall die without attaining a vested interest or vested interests in his or their legacy or legacies, then I give and bequeath the said legacy or legacies of him or them so dying unto the others or other of my said sons." The testator bequeathed the residue to his seven children in equal shares, and directed that the share of each child should be held, applied, and disposed of upon the same or the like trusts and in the same or the like manner in all respects as were thereinbefore mentioned concerning his or her pecuniary legacy.

John Frederick, one of the sons, attained the age of twenty-one years, and died in the testator's lifetime, leaving a daughter. The testator thereupon, by a codicil, revoked the pecuniary

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legacy given to him, and gave a legacy of the same amount upon trusts for the grandchild, but did not make any disposition affecting the residue.

The testator died in 1836, leaving his widow (who died in 1872) and his other six children surviving. On the death of the widow the fund set apart for providing her annuity fell into the residue. The trustees paid into court under the Trustee Relief Act the one-seventh share of such fund which John Frederick would have taken had he survived the testator.

This was a petition presented by the surviving son, who claimed one half of the fund in his own right and the other half as the administrator of his eldest brother, who had attained twenty-one, survived the testator, and died.

Mr. *Dickinson*, Q.C., and Mr. *Cadman Jones*, for the petitioner :

It is submitted that the court must, in construing this will, adhere to the words of it. John Frederick died without attaining a vested interest, and the question is, did the testator make a complete disposition of his property, or did he intend to die intestate as to a portion of it? The respondents will probably contend that the will should be read as if the gift over had been "in case any of my sons shall die under twenty-one and without issue," in which case there would, no doubt, have been an intestacy: but it is submitted that he endeavored to provide for every contingency, and further, that this case is governed by the decision in *Walker v. Main* ⁽¹⁾. The object was not to die intestate as to this particular portion, but to provide for the circumstance of one son not getting that which was given to him, and in the event which has happened the two surviving sons became entitled to the fund: *Sykes v. Sykes* ⁽²⁾.

Mr. *W. W. Cooper*, for the representatives of the testator's widow.

Mr. *Jolliffe*, for the child of the son who died in the testator's lifetime: The testator, in using the words "upon the same or the like trusts and in the same and the like manner in all respects," intended to refer to the trusts declared of the daughters' legacies, and not the sons', for of those legacies no trusts were declared. There was no gift over of this particular fund, and the event which happened had had an effect upon the gift of residue in this way: i. e. the share of John Frederick having lapsed, there is an intestacy, and his daughter is entitled to a share as one of the next of kin.

Mr. *Russell Roberts*, for other next of kin, also submitted that there was an intestacy. He cited *Ryder v. Wager* ⁽³⁾.

⁽¹⁾ 1 Jac. & W. 1; in this case it appears from the recitals in the decree in the Registrar's Book, Reg. Lib. 1818, B. 2051, that Mary Main had attained the age of twenty-one.

⁽²⁾ Law Rep., 3 Ch., 201.

⁽³⁾ 2 P. Wms., 328.

Mr. *Ashmore*, for the surviving trustee of the will.

Mr. *Dickinson*, in reply.

SIR W. M. JAMES, L.J.: I cannot draw any substantial distinction between this case and that of *Walker v. Main*. The testator has not said that the legacy is to go over "if the legatee shall die under the age of twenty-one years without leaving issue," but if he "shall die without attaining a vested interest in his legacy." The legatee *John Frederick died with- [389 out attaining a vested interest, and the precise event on which the legacy was given over has happened. The question here relates only to that legatee's share of the residue, but it is impossible to say that the words of reference in the residuary gift do not import all the limitations to which the pecuniary legacies were subject in the same way as if the words had been repeated *totidem verbis*. Some argument in favor of the gift over taking effect may be drawn from the language of the codicil, but I do not rely on that. I prefer resting my decision on the broad ground that the event has happened upon which, according to the plain sense of the words of the will, the property was to go over; and even without the authority of the decision in *Walker v. Main*, I should have decided this case in the same way. The fund must be transferred to the petitioner.

Solicitors: Messrs. *Grane & Son*; Messrs. *Valpy & Chaplin*; Messrs. *Rhodes & Son*; Messrs. *Cunliffe & Beaumont*.

[Law Reports, 15 Equity Cases, 389.]

L. J.J. for V.C.W. Feb. 25, 1873.

SYNGE v. SYNGE.

[1872 S. 121.]

Will — Election.

A testatrix advanced £900 to M on an assignment by him of a covenant by F to transfer to M £1000 stock, and to pay interest at £5 per cent. By her will she gave F £3000 and all sums due to her by him, and directed her executors not to require payment of the £900 due from M, but out of the £3000 given to F to retain enough to purchase £1000 stock, in satisfaction of the covenant by F and to pay the surplus thereof beyond the £900 and interest to M. F having predeceased her, she by a codicil directed the £3000 to form part of her residuary estate, but directed her executors not to call on F's representatives for payment or transfer of the £1000 stock, nor to enforce payment by M of the £900:

Held, that M was not at liberty to enforce against F's estate the covenant to transfer the £1000 stock.

THIS was a special case. By an indenture, dated the 23d of April, 1858, between F. H. Synge, of the first part, and M. H. Synge, of the other part, *F. H. Synge, for considerations [390 therein mentioned, covenanted with M. H. Synge, his heirs,

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executors, and administrators, that within twelve months after the death of Sir J. M. Tylden he would transfer £1000 £3 per cent Reduced Annuities into the name or names of the defendant, his executors, administrators, or assigns, and would, in the meanwhile, pay interest half yearly, during Sir J. M. Tylden's life, equal to one moiety of the half yearly dividends on £1000 £3 per cent Reduced Annuities, and after the death of Sir J. M. Tylden, a sum equal to the whole dividends.

By an indenture, dated the 8th of March, 1866, between the defendant M. H. Synge, of the one part, and Mary A. Synge, of the other part, reciting the indenture of the 23d of April, 1858, and that Sir J. M. Tylden was living, and Mary A. Synge had agreed to lend M. H. Synge £900, it was witnessed, that in pursuance of the said agreement, and in consideration of the said agreement, and of the sum of £900 paid by Mary A. Synge to the defendant, he, the defendant, did bargain, sell, assign, and transfer to Mary A. Synge, her executors, administrators, and assigns, all that indenture of the 23d of April, 1858, and the principal and interest thereby secured, for the benefit of the defendant, and all the right and interest of him, the defendant, in and to the same, to have and to hold, receive and take, the said indenture, moneys, funds, and premises unto the said Mary A. Synge, her executors, administrators, and assigns, with power in the name of the defendant to receive and demand the same, and to give discharges for the same: Provided that, if the defendant, his heirs, executors, or administrators, should, on or before the 8th of September then next, pay the said Mary A. Synge, her executors, administrators, or assigns, the sum of £900, with interest thereon at £5 per cent, she, the said Mary A. Synge, would reassign. Then followed a covenant by the defendant, in the usual form, to pay the principal and interest.

Sir J. M. Tylden died on the 8th of May, 1866, and after his death an arrangement was come to between F. H. Synge and M. H. Synge that the transfer of the £1000 £3 per cent reduced annuities should not be made forthwith, but that in the meanwhile F. H. Synge should pay interest at £5 per cent on the 391] market value *of the £1000 £3 per cent Reduced Annuities. The value was ascertained, and F. H. Synge paid to M. H. Synge interest on the value so ascertained until the 18th of May, 1871. M. H. Synge paid to Mary A. Synge interest till the 1st of July, 1871.

F. H. Synge died on the 17th of September, 1871, having, by his will, given all his real and personal estate to his widow, and appointed her executrix. She proved the will.

M. A. Synge died on the 6th of November, 1871. Among other legacies, by her will, dated the 8th of September, 1871,

she bequeathed the following: "To my late husband's nephew, M. H. Synge, thirty-six B shares in the Weston-super-Mare Gas Company. To my late husband's nephew, F. H. Synge, £3000, and all such sums of money, if any, as he may be indebted to me at the time of my death, except as hereinafter mentioned." The testatrix declared that in case any pecuniary legatee should die before her, his or her legacy should not lapse, but be paid to his or her personal representatives as part of his or her personal estate. The will proceeded as follows: "And whereas, by an indenture dated the 23d April 1858, F. H. Synge covenanted with his brother M. H. Synge to transfer into M. H. Synge's name, his executors, administrators, or assigns, £1000 £3 per cent Reduced Annuities at the end of twelve months after the death of Sir J. M. Tylden, and to pay him interest thereon in the meantime: And whereas, by an indenture dated 8th March, 1866, the defendant, M. H. Synge, assigned the first mentioned indenture, and the moneys secured thereby, to me, by way of mortgage, for securing to me the said sum of £900 and its interest, Now I do hereby will and direct that if at my death the said sum of £900 and its interest, so secured to me by the said indenture of the 8th March, 1866, or any part thereof, shall be still due to me, and if the aforesaid covenant, on the part of the said F. H. Synge, contained in the indenture of the 23d April, 1858, shall be still unperformed, my executors shall not require payment of the said sum of £900 from the said M. H. Synge, but they shall retain out of the legacy of £3000 bequeathed by me to F. H. Synge so much as shall be sufficient to purchase, for the benefit of my estate, the said sum of £1000 reduced £3, and the costs attending such purchase, and such purchase when made, shall be in satisfaction of the afore- [392 said covenant of F. H. Synge; and if the said £1000 stock shall be worth more than the said debt of £900 and the interest then due thereon, the surplus shall be paid to the said M. H. Synge by my executors." By a codicil, dated the 30th of October, 1871, she made the following disposition: "Whereas, since the date of my will, F. H. Synge has died, Now I hereby declare that, notwithstanding anything contained in my will to the contrary, the legacies bequeathed to him shall not go to his representatives, but shall form part of my residuary estate, subject to payment of debts and other legacies: I will and direct that my executors shall not call upon the representatives of F. H. Synge for payment of any moneys, or for the transfer of any stock, pursuant to the deed of covenant of the 23d April, 1858, nor enforce payment by M. H. Synge on security of deed of 8th March, 1866." The market value of the £1000 £3 per cent reduced at the date of the will was £915 12s. 6d.; at the date

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of codicil £911 13s. 4d.; at the date of testatrix's death £910 12s. 6d. M. H. Synge claimed to take the benefit of the forgiveness of the debt of £900 and the share legacy, and to enforce the covenant against F. H. Synge's estate; but if put to election, he elected to take under the will. The plaintiff was the executrix of F. H. Synge, and the defendant was M. H. Synge, and the questions submitted were, whether M. H. Synge was entitled to enforce the covenant, and whether the plaintiff was entitled to have the deed of covenant delivered up.

Mr. Heming, for the plaintiff: On the construction of the will and codicil taken together, the meaning is clear. If the £900 and the stock were exactly the same in value, there could hardly be a contest, and they were very nearly equal. The intention of the testatrix, in the event that took place after the death of Francis, was to benefit her husband's nephew, M. H. Synge, by relieving him of his debt to the testatrix, and to benefit the widow of F. H. Synge, by satisfying her husband's covenant. If that be not so, she conferred no benefit at all on F. H. Synge's estate. If it be said that after forgiving the debt the stock was 393] not hers, then M. H. Synge is put to his election. The natural construction must be followed, though it leads to election: *Wilkinson v. Dent*⁽¹⁾.

Mr. Cookson, for the defendant: *Wilkinson v. Dent* has no application to this case, which is one of construction, not of election. The testatrix did originally, in her will, intend to benefit the representatives of Francis, but she altered her mind and withdrew her bounty. Had she intended to prevent M. H. Synge from enforcing his claim against F. H. Synge's estate, she might have done so, instead of which she simply says her executors are not to enforce it. Under these circumstances, there is nothing to prevent M. H. Synge from enforcing his security, though the testatrix's executors cannot do so.

SIR W. M. JAMES, L.J.: The will and codicil form one entire instrument, and reading them together, the obvious meaning is that the testatrix intended to provide for the debt due from F. H. Synge to M. H. Synge out of the legacy of £3000. When F. H. Synge died she, by her codicil, revoked the direction that his representatives should take the legacy, but she intended to continue her bounty to his representatives to the extent of the debt due on the security, and therefore she declared that her representative should not enforce the covenant to transfer the sum of £1000 reduced three per cents. This covenant had been assigned to her, and she was the person who had the right to deal with it, and she exercised that right by directing that the persons who had the paramount right to enforce it should not

(1) Law Rep. 6 Ch., 339.

be at liberty to do so. M. H. Synge, who assigned this covenant to the testatrix, cannot enforce it either, and the questions must be answered accordingly. Solicitor for *M. H. Synge*: Mr. Mossop.

Solicitor for the representative of *F. H. Synge*: Mr. Osborn Jenkyn.

[Law Reports, 15 Equity Cases, 402].

L. J. J. for V. C. W. March 12, 1873.

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[1872 W. 11].

Conversion — Partnership — Land "involved in Trade."

A testator, a nurseryman, devised his real estate, on part of which he had carried on his business, and his residuary personal estate, to his three sons, F, M, and J, as tenants in common. After his death they carried on the business in partnership, and out of moneys belonging to the estate completed a contract for the purchase of more land which was inchoate at the death, and employed such land in the business. Subsequently, F and J purchased M's third share in the land and business, and paid for it partly out of the estate and partly out of moneys borrowed on the land. F and J then continued the business on the land. F subsequently died intestate:

Held, that both the devised and the purchased land employed in the business was converted.

JOHN WATERER was the owner of freehold land near Bagshot, on which he carried on the business of a nurseryman, under the name of John Waterer & Sons. He was assisted in his business by his three sons, Frederick, Michael, and John, to whom he paid certain sums for maintenance, but who were not otherwise interested in the business. He also possessed other real property. By his will, dated the 29th of August, 1867, he devised to his son Frederick, absolutely, a certain freehold house and land. The house and land in which he, the testator, then resided he gave to his son Michael, reserving for twenty-one years from his decease, for the benefit of those who might carry on his business, the use of a room on the ground floor for an office, without paying any rent for the same. After giving several pecuniary legacies, including £1000 to Frederick and £1000 to Michael, he devised and bequeathed all his real estate and the residue of his personal estate, including the goodwill of the business, unto his three sons, Frederick, Michael, and John, their heirs, executors, and administrators, as tenants in common, in equal shares, and he appointed his sons executors of his will. The testator died on the 2d of November, 1868, and his will was proved by Frederick and John, but Michael subsequently renounced.

*At his death there was subsisting a contract between [403

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him and one Hodges for the purchase, for the purpose of his business, of a house and farm at Bagshot called the New Farm, for £3,400. The contract was, after his death, carried into effect by his three sons, to whom the land was conveyed as tenants in common. For a short time the business was carried on by the three sons under the same style as before, but in April, 1869, it was arranged that Michael should retire, and as the residuary real and personal estate of the testator (except invested property) was employed in the business, it was arranged that Frederick and John should purchase Michael's interest under the will, except certain furniture, for £52,000, the purchase to be completed by the 1st of May, 1869. The purchase-money was subsequently increased to £52,500, to include profits from the testator's death, and was carried into effect on the 25th of March, 1870, when Michael Waterer granted, assigned, and confirmed unto Frederick and John Waterer all the dwelling-house devised by the testator to Michael, together with furniture and other things therein. And also all that one equal undivided third part or share of him Michael Waterer of and in the freehold lands, houses, and hereditaments belonging to the testator; and all that one undivided equal one-third part or share of him the said Michael Waterer in the residuary personal estate of the testator including, the goodwill of the said business, and all other claim or share, if any, of the said Michael Waterer, into or out of the real and personal estate of the testator, including the legacy of £1,000, and in and to the rents, profits, and proceeds of the real and personal estate, except certain furniture removed from the house, to hold the same to the use of Frederick and John Waterer, their heirs, executors, administrators, and assigns, according to the nature and tenure thereof, in equal shares as tenants in common.

After completing the purchase from Michael, Frederick and John continued to carry on the business of nurserymen in partnership, under the old style of John Waterer & Sons, upon the same land, with the addition of the land purchased from Hodges. Michael's share of the estate was, in fact, purchased only in order to enable Frederick and John to carry on the business. The funds out of which the purchase was made were as follows : 404] £2,000 out of the assets, £8,000 left due on the joint and several bond of Frederick and John, £27,000 paid out of moneys belonging to the testator's estate called in for that purpose, and £15,000 borrowed from the London and County Bank on the joint and several note of Frederick and John Waterer, secured also with other moneys on the deposit of the title deeds. of the greater part of the real estate of the testator, including that purchased from Hodges. £6,500 of the debt was paid off by

Frederick and John Waterer, leaving only £11,500 due. The £8,000 owing to Michael on the bond was also charged on the land subject to the charge of the bank, and was still owing.

On the 4th of October, 1871, Frederick Waterer died intestate, leaving his widow and ten children him surviving. His widow obtained letters of administration of his estate, and on the 11th of January, 1872, filed this bill. On the 4th of July, 1872, the chief clerk by his certificate found the facts above stated, and found that the said lands and hereditaments generally were, in fact, purchased and acquired for, and the same had been chiefly converted from time to time and used and occupied for or in connection with the business of a nurseryman; that such parts thereof as had not, at the death of the said intestate, been so converted, nor retained, nor used, were inserted in the schedule, parts 2 and 3, viz., four fields in pasture, let to one Frimbley, as yearly tenant, at a rent of £20; five houses to which the intestate was entitled, in equal moieties; and a field of one and a half acres unlet.

The certificate also found that the intestate had become answerable, or had expended £18,416 13s. 4d. in the purchase of Michael's third share under the will.

Mr. *Dickinson*, Q.C., and Mr. *Charles Browne*, for the plaintiff, the widow.

Mr. *Greene*, Q.C., and Mr. *Cookson*, for the younger children of Frederick: It is shown on the certificate that the land was used by the testator for the purpose of his trade, and that he devised it to his sons for the same purpose, else why did he reserve the room in the *house for an office? It is admitted [405 that the sons employed the land devised, and acquired the additional land, for the purpose of carrying on the trade of nurserymen. In Mr. Lindley's valuable book ⁽¹⁾ all the cases are collected, and the writer adds these observations: "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate. And although the decisions upon this point are conflicting, the authorities which are in favor of the above conclusion, certainly preponderate over the others." Here the land was devised to the sons that it might be used as a partnership property, and the new land acquired by the three co-partners solely for the same purpose, and both used as partnership assets. This distinguishes the

(1) 2d Ed., vol. i, p. 677.

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case from those authorities which appear to conflict with the rule: such as *Thornton v. Dixon* ⁽¹⁾; *Randall v. Randall* ⁽²⁾. On the other hand, the rule is supported by numerous authorities: *Ripley v. Waterworth* ⁽³⁾; *Townshend v. Devaynes* ⁽⁴⁾; *Phillips v. Phillips* ⁽⁵⁾; *Darby v. Darby* ⁽⁶⁾; *Essex v. Essex* ⁽⁷⁾; *Myers v. Perigal* ⁽⁸⁾; *Forbes v. Steven* ⁽⁹⁾. On these authorities, the decision ought to be that the land was personal estate.

Mr. *Lindley*, Q.C., and Mr. *Droop*, for the heir at law: There is, no doubt, some conflict in the authorities, which in one or two cases are irreconcilable; but except in those cases, the principle is clear. The trade of a nurseryman, which is not mentioned in the Bankrupt Act, though a market gardener is, bears more analogy to that of a farmer; but in *Morris v. Barrett* ⁽¹⁰⁾, where two devisees of land carried on the business of a farm and kept moneys in one common stock, and one died, 406] it was held they *were joint tenants of the lands devised, but tenants in common of after-acquired lands. In *Brown v. Oakshot* ⁽¹¹⁾, where the business carried on was that of a brewer, it was held that a devise to them both did not make them tenants in common. The only case where land acquired by devise was treated as partnership assets is *Essex v. Essex* ⁽⁷⁾, but that is quite inconsistent with *Cookson v. Cookson* ⁽¹²⁾. In *Stewart v. Blakeway* ⁽¹³⁾, the court held that shares in land purchased for a partnership business passed to the heir-at-law. [They also referred to *Bisset on Partnership* ⁽¹⁴⁾, and *Myers v. Perigal* ⁽⁸⁾.]

SIR W. M. JAMES, L.J.: I am of opinion that this case is governed by that class of cases in which Lord Eldon said that where property became involved in partnership dealings it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent or devise, if in fact it was substantially involved in the business. If, instead of Michael selling his undivided third part, there had been a partition beforehand, and then a purchase by the other partners of his allotment, it would have been impossible to say that the freehold so bought to carry on the business was not within the authorities. They buy it, not as an undivided third only, but in one lump, for one lump sum, including the goodwill; therefore, it was, in fact, a purchase of land and business altogether, by the continuing

(1) 3 Bro. C. C., 199.

(2) 7 Sim., 271.

(3) 7 Ves., 425.

(4) Cited in Lindley on partnership, 669, 2d Ed.

(5) 1 My. & K., 649.

(6) 8 Drew., 495.

(7) 20 Beav., 442.

(8) 2 D. M. & G., 599.

(9) Law Rep., 10 Eq., 178.

(10) 8 Y. & J., 884.

(11) 24 Beav., 254.

(12) 8 Sim., 529.

(13) Law Rep. 6 Eq., 479.

(14) Page 56.

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partners jointly, for the purpose of the business. Under those circumstances, I think they must be deemed to have irrevocably appropriated each of them his share in the land to the partnership purposes. A nursery gardener's business is probably one above all others where men would act as these gentlemen appear to have done. They necessarily appropriated the soil itself for gardening purposes which could not be carried on without it. It is, in fact, in nursery gardening, practically impossible to separate the use of the soil for the trees and shrubs, from the trees and shrubs *themselves, which are part of the free- [407 hold, and at the same time constitute the substantial stock-in-trade. In my judgment, therefore, the land used in the trade is part of the partnership property, and therefore personal estate. The house and land not used for the partnership business, but let to tenants, remain real estate. The mortgages must be paid exclusively out of personal estate.

Solicitor for the plaintiff and younger children: Mr. J. R. Adams.

Solicitors for the heir-at-law: Messrs. Janson, Cobb, & Pearson.

[Law Reports, 15 Equity Cases, 407.]

L.J.J. for V.C.W. March 21, 1873.

In re ANGLO-MORAVIAN HUNGARIAN JUNCTION RAILWAY COMPANY.

DENT'S CASE.

Company—Subscriber of Memorandum—Article of Association—Allotment of Paid up Shares—Agreement.

W D, one of the seven persons who subscribed the memorandum of association of a company, to work a certain concession, agreed to take 100 shares. A recital of the articles of association was that E, who assigned the concession to the company, had agreed to cause to be allotted to the persons subscribing the articles, shares to be deemed fully paid up, and the fifth article stated that the shares of each subscriber of the memorandum should be allotted to him as fully paid up, and that a competent number of shares should be allotted to E in pursuance of the arrangement which had been previously come to. The company was registered on the 22d of September, 1865, and on that day the directors issued to E, for work already done, &c., &c., £50,000 in debentures and 4000 shares. W D was a director.

On the 3d of October, 1865, E requested the secretary to place shares of the 4000 in the names of the persons mentioned, W D being one of them, for 100 shares. The company was afterwards ordered to be wound up. The official liquidator placed the name of W D on the list of contributors in respect of the 100 shares for which he subscribed, and on summons asking that a call of £3 a share might be made:

Held, that W D's name had been rightly placed on the list, and that he must pay the call, and that it was not competent to persons who had bound *themselves by the memorandum to take and pay for shares, to introduce [408 an article into the articles of association to the effect that they should not be called upon to pay anything.

Pell's Case (1) observed upon.

(1) Law Rep., 5 Ch., 11.

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THIS was an adjourned summons. The Anglo-Moravian Hungarian Junction Railway Company, Limited, was registered on the 22d of September, 1865, under the Companies Act, 1862, and it was ordered to be wound up on the 22d of April, 1870.

The memorandum of association stated that the object of the company was to construct and work a railway in Moravia, in accordance with a concession from the emperor of Austria, and for the execution of other works; that the liability of the members was limited; that the capital of the company was £500,000 in 25,000 shares of £20 each; and that the seven persons whose names and addresses were subscribed were desirous of being formed into a company in pursuance of the memorandum of association, and that they had respectively agreed to take the number of shares in the capital of the company set opposite their respective names.

Wm. Dent was one of such seven persons, and he subscribed for 100 shares.

The concession had been granted to Mr. Raiken and Mr. J. B. Even, and one of the recitals of the articles of association was that Even (who was authorized to act as attorney for Raiken in the assignment of the concession) had agreed to cause to be allotted to certain of the persons subscribing the said articles shares in the company to be deemed fully paid up shares; and the fifth article of association was as follows: "The shares written in the memorandum of association opposite the name of each subscriber, shall be allotted to him as fully paid up, and a competent number of shares shall be allotted to Even," in pursuance of a written agreement which had been come to on the 19th of September, 1865. It was part of that agreement which was entered into by the parties who were to form the company, and Even (who was the contractor of the company), that in respect of certain works and labor already done, and 409] goods and materials supplied, and contracts entered into, and expenses incurred by him, there should be payable to him £50,000 in debentures and £80,000 in 4000 shares, and, accordingly, at the first meeting of the directors, held on the 22d of September, 1865, it was ordered that such debentures and shares should be sealed and issued to Even: and that was thereupon done.

Every member holding not less than fifty shares was eligible as a director, provided all calls made on all his shares should have been paid.

Dent was a director, the first managing director, and chairman of the company.

The only claim established in the winding-up was for the sum (principal and interest) of £1997 9s. 7d., by a transferee of

seventy-nine of the debentures which had been issued to Even. It appeared that, on the 3d of October, 1865, Even wrote to the secretary of the company, requesting him to make out shares in the names of gentlemen, nine in number, seven of whom were the original subscribers, for the numbers opposite their names, including 100 in the name of Dent, and he said he would inform the secretary how he wished the remaining shares should be prepared to complete the 4000. The official liquidator had settled six of the original subscribers, and Even and two other persons, on the list of contributories for, in the aggregate, 4000 shares, and this was a summons taken out by the liquidator, asking that a call of £3 a share might be made upon all the contributories.

Dent's evidence was, that it was part of the original agreement upon the formation of the company that his 100 shares should be fully paid up; that he signed the memorandum and articles of association upon the faith and in consideration of having the shares allotted to him as fully paid up; that no prospectus of the company was ever issued; that the company was never advertised to the public: that no shares were ever subscribed for by the public; and that the whole of the shares allotted were allotted as fully paid up.

Mr. *Dickinson*, Q.C. (Mr. *Cracknall* with him), for the official liquidator, after stating the facts, was stopped by the court.

*Mr. *Lindley*, Q.C., and Mr. *Marten*, for Mr. Dent: [410 The Companies Act, 1867, has nothing to do with this case, this company having been formed in 1865. The first question is, ought not Dent to be treated as the holder of 100 fully paid up shares? and the 5th article is perfectly conclusive. The memorandum and articles were registered on the same day, and were part of one transaction, and must be construed together; and the decisions have gone to this length, that where the memorandum has been signed, as here, by Dent, if it appears from the articles that the shares were to be treated as fully paid-up, that is sufficient. The articles of association in this case embodied the agreement which had been previously entered into with Even, and which was to be carried out by him, and Dent shows by his evidence that the shares for which he subscribed were fully paid up; *i. e.* they were a part of those shares which had been allotted to Even, and to which he was entitled, as part of the bargain between him and the company, as fully paid up shares: *Pell's Case* ⁽¹⁾; *Drummond's Case* ⁽²⁾; *Jones' Case* ⁽³⁾; Companies Act, 1862, ss. 11-14.

But if Dent should be retained upon the list, he ought not to

⁽¹⁾ Law Rep., 5 Ch., 11.

⁽²⁾ Law Rep., 4 Ch., 772.

⁽³⁾ Law Rep., 6 Ch., 48.

1873

Dent's Case.

L.J.J. for V.C.W

be required to pay the call upon more than fifty shares. The real question, however, is, can the court strike out the 5th article of association, and hold that it has no application to this case? The agreement with Even was a *bona fide* one. It fully appeared in the articles of association; so that the creditors and others could not be misled. They knew that these shares were issued as fully paid up to Even for works already done by him, Dent having signed the articles upon the faith of having fully paid up shares; he cannot be required to pay this call; and therefore the summons ought to be dismissed with costs.

SIR W. M. JAMES, L.J.: I am of opinion that Mr. Dent's name must remain on the list of contributories. It is not necessary for me to go at length into the *cases which have been cited. I have more than once expressed a strong — I may say something more than a strong — inclination of my opinion, that *Pell's Case* ⁽¹⁾ was originally rightly decided; but I am, of course, bound by the decision of the Court of Appeal, sitting here, as I do, as vice chancellor, and should follow it if it governed this case; but it appears to me that the *ratio decidendi* does not extend to this case, and therefore I must act upon what I conceive to be the law applicable to it, which I think is a very simple one. Certain persons bound themselves by the memorandum of association to take shares and to pay for them, and the question is, whether it was competent to them to introduce an article into the articles of association, which in fact and in terms says that, notwithstanding those persons did undertake, by subscribing the memorandum and the articles of association, to take and pay for shares, they shall not be called upon to pay one farthing for them. It appears to me that the article is about as substantial an alteration of the memorandum as it is possible to conceive, such an alteration as is not permitted by sect. 12 of the Companies Act, 1862, and therefore I am of opinion that Dent is liable for the call. The order must be as asked. The costs of the liquidator must be costs in the winding-up, and Dent must pay his own costs.

Solicitors: Mr. T. E. Watkin; Messrs. Thomas & Hollams.

(1) Law Rep., 5 Ch., 11.

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A.

ABANDONMENT.

See INSURANCE, MARINE, 40.

ACTION.

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ADMIRALTY.

1. By charterparty made by defendant's agent in France, defendant chartered plaintiff's ship, and it was stipulated that the ship should load a cargo of pressed hay at T., in France, and proceed direct to London; and all cargo was to be brought and taken from ship alongside. Defendant's agent verbally told the master that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port, the master was unable to land the hay at the wharf by reason of an order in council under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United Kingdom. The order had been made before the charterparty was entered into, but neither party knew of it. After some delay, defendant received the hay from alongside the ship into another vessel, and exported it. There was no legal obstacle to doing this, but eighteen days were allowed by the defendants to elapse beyond the lay days. The plaintiff having brought an action for this detention of his ship, the defendant contended that the contract was for an illegal purpose, and therefore void:
Held, that, although it was the intention of the parties, when the char-

terparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void; and defendant was therefore liable for the demurrage. *Waugh v. Morris.* 197

2. A British ship was mortgaged by an instrument that was in the form prescribed by the Merchant Shipping Act, 1854, and was duly registered. The mortgagor died intestate, and the mortgagees sold the ship under their power of sale, and executed a bill of sale to the purchaser. By mistake, a receipt for the payment of the mortgage money was endorsed on the mortgage and signed by the mortgagee, and produced to the registrar of shipping, who recorded the same. Afterwards the bill of sale was produced to the registrar, who refused to register it, upon the ground that the property in the ship had vested in the representatives of the mortgagor.

In order to complete the title of the purchaser, a suit in *rem* was instituted on behalf of the mortgagee and purchaser, and in such suit the court held it had jurisdiction to grant a decree declaring that the purchaser was entitled to possession of the ship: *The Rose.* 550

3. The defendant shipped on board the steamship of the plaintiff in the port of London a number of barrels of petroleum. A bill of lading was given for the goods: it provided that the goods should be delivered at the port of Havre, the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, etc., excepted, unto order or assigns on paying freight. It further provided that the goods should be taken out within twenty-four hours after arrival, or pay a fixed sum per day de-

murrage, and a note in the margin stated that the goods were subject to a landing charge of 5 per cent on the amount of freight and primage. The defendant wrote to G, who was the ship's broker at Havre, informing him that the petroleum was to be sent to Rouen, and that he was not to deliver it without production of the bill of lading regularly endorsed, and that the freight and other expenses were to be charged on the goods. The vessel arrived in the harbor at Havre, on the night of the 7th of December, 1870, with the petroleum and other goods on board. Owing to there being at the time a large quantity of war material at Havre, the authorities there would not allow the petroleum to be landed, and would not allow the vessel to remain in the harbor with the petroleum on board. On the morning of the 7th of December the vessel sailed from Havre and proceeded to Honfleur and Trouville, but the authorities at those ports refusing to allow the petroleum to be landed, the vessel returned to Havre, on the 12th of December, and in the outer harbor there transhipped the petroleum into a lighter hired on behalf of G to receive it. The vessel then went into dock, and having discharged the rest of her cargo and shipped a fresh cargo for London, she was obliged by the authorities at Havre, to re-ship the petroleum. On the 16th of December she sailed from Havre, and in due course she arrived at the port of London with the petroleum on board. G was well aware of the various movements of the vessel. The bill of lading for the petroleum was not presented at Havre or elsewhere. The defendant had notice of the petroleum being brought back to London, but he did not take delivery of it. The plaintiff instituted a suit in *rem* against the petroleum:

Held, that the plaintiff was entitled to recover in such suit the bill of lading freight, and the expenses and demurrage incurred in respect of the petroleum at Havre, Honfleur, and Trouville, and freight for the carriage of the petroleum from Havre to London.

4. *Seemle*, that there was an entire execution of the contract on the part of the plaintiff.
5. But even if there was not such entire execution, still he was entitled to re-

cover the bill of lading freight, because there was such an execution of the contract as he could effect consistently with the incapacity of the cargo.

6. Where a master of a ship, in order to preserve cargo, takes measures such as a wise and prudent man would think most conducive to the benefit of all concerned, the cargo is subject to a lien for the expenses so incurred, and this lien may be enforced by a suit in *rem*, by virtue of the provisions of the County Courts Admiralty Jurisdiction Amendment Act, 1869. *Cargo ex Argos*. 552

7. A Dutch bark was riding at anchor off Deal, and waiting to proceed down Channel, and a waterman who, though not a licensed pilot, was in the habit of piloting vessels, was taken on board her, under an arrangement whereby he was to receive 7s. a day, with 5s. in addition, for navigating the vessel as pilot until she arrived off Beachy Head. The day after the waterman came on board, and whilst the bark was still at anchor, a gale came on, and the tempestuous state of the weather caused the vessel to drive, and rendered it necessary to slip the chain, when under the direction of the waterman the vessel was taken through the Gull Stream and brought up in safety in Margate Roads.

In a salvage suit instituted on behalf of the waterman and other persons who had rendered services to the vessel, the court held, that the services rendered by the waterman were within the scope of his contract, and that he was not entitled to claim as a salvor. *The Aeolus*. 565

8. In a suit instituted on behalf of the owners, master, and crew of a steam tug, to recover salvage reward for salving a disabled vessel and her cargo, it appeared by the petition that persons other than the plaintiffs in the cause had assisted in the service, and in an article in the answer filed on behalf of the owners of the salvaged vessel and her cargo, the defendants alleged that they had been ordered by a court of competent jurisdiction to pay to such other persons the sum of 240*l.*, in respect of the assistance so rendered by them.
9. The plaintiffs moved to strike out this article. The court holding that

the article was relevant to the matters
in issue in the suit rejected the motion.
The Antelope. 569

BILLS OF LADING.

See BOTTOMREY, 546.
INSURANCE, MARINE.

ADMISSIONS.

See CRIMINAL LAW, 159, 167, *note*.

ADVANCEMENT.

1. A father purchased a copyhold cottage in the name of his son. Shortly after the purchase the father served notice to quit on an occupying tenant, but afterwards allowed her to remain at an increased rent, and during his life received the rents and paid the outgoings:

Held (notwithstanding evidence of declarations that the cottage was the son's after his father's death), that the purchase was not an advancement.
Stock v. McAcay. 711

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See BANKRUPTCY, 323.

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See PRINCIPAL AND AGENT.

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ALIMONY.

1. The respondent having obtained an order upon the petitioner to pay to her or her attorney a certain amount of taxed costs, endeavored to enforce such order by a writ of *fi. fa.*, but failed in recovering them. The court ordered the proceedings in the divorce suit to be stayed until the taxed costs had been paid by the petitioner, but would not extend the order to the expenses incurred in the suing out and execution of the writ of *fi. fa.* *Keane v. Keane.* 544

ALTERATION.

1. An alteration in the date of a bill of exchange payable at a specified period after date is a material alteration; and where the bill is declared upon with its altered date, the defense is available to the acceptor under a traverse of the acceptance. *Hirschman v. Budd.* 361

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ARREST.

1. Without warrant on a charge of felony proper, and if defendant breaks prison he is guilty of an escape. *Regina v. Waters.* 469

ARSON.

See CRIMINAL LAW, 392, 483.

ASSAULT.

1. How far consent by child, excuses. 496

ASSIGNMENT.

1. A, being a factor and warehouse keeper, by letter of hypothecation pledged to B certain wools to secure a sum of money. No delivery of the warrants for the wools was made, but a promise to deliver them on the following morning was added at the foot of the letter. After being pressed daily to deliver the warrants, A absconded. B thereupon obtained from A's clerk the keys of the warehouses and possession of the wools. A was a few days afterwards adjudicated bankrupt. The wools belonged to third parties, who had, however, been under advances from the bankrupt, and made no claim:

Held, that the letter created a good equitable charge; that it did not require registration under the Bills of Sale Act; that the goods were not in the order and disposition of the bank-

rupt; that the transaction was a valid pledge under the Factors Act; and that B had a good title against the trustee in bankruptcy. *Ex parte North Western Bank.* 719

ATTEMPT.

1. Sending a letter which is intercepted and never reaches the person to whom it was addressed is an attempt to solicit and incite. *Regina v. Banks.* 471

ATTORNEY.

1. The court will not make an order upon a solicitor compelling him to disclose the address of his client (a defendant) who has absconded, and whom plaintiff seeks to serve with a *subpoena duces tecum* to compel his appearance at the hearing with documents material to the plaintiff's case. *Heath v. Crealock.* 826, 833, note

AUCTIONEER.

1. The defendant, an auctioneer, advertised in the London papers that certain brewing materials, plant, and office furniture would be sold by him at Bury St. Edmunds, on a certain day and two following days. The plaintiff, a commission broker in London, having a commission to buy the office furniture, went down to the sale; on the third day, on which the furniture was advertised for sale, all the lots of furniture were withdrawn. Upon which the plaintiff brought an action against the defendant to recover for his loss of time and expenses:

Held, that plaintiff could not maintain the action; for that the advertising the sale was a mere declaration, and did not amount to a contract with any one who might act upon it, nor to a warranty that all the articles advertised would be put up for sale. *Harris v. Nickerson* 238

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B.

BANKRUPTCY.

1. The trustee of a bankrupt's estate applied, under the 72d section of the Bankruptcy Act, 1869, to the Court of Bankruptcy to declare a bill of sale, made by the bankrupt previously to his bankruptcy, fraudulent and void as against himself as trustee, and to order the assignee under the bill of sale who had previously to the bankruptcy sold the goods comprised therein, to pay over the proceeds of the sale to himself as such trustee. The Court of Bankruptcy having made the order prayed for, and the assignee having accordingly paid over the proceeds of the sale:

Held, that the trustee could not afterwards bring an action of trover against the assignee under the bill of sale to recover the difference between the value of the goods and the amount realized by the sale, inasmuch as by the proceedings in bankruptcy to recover the proceeds of the sale he had affirmed such sale and waived the tort. *Smith v. Baker.* 323

2. A resolution under the Bankruptcy Act, 1869, s. 126, by the requisite majority of creditors to accept in satisfaction from the debtor a composition upon the debts due, payable at a future time or by instalments, may be pleaded in bar to an action for the original debt, brought before any default on the debtor's part by a creditor bound by the resolution. *Slater v. Jones.* 373

3. An alien non trader domiciled abroad, who contracts debts in England, is liable to be made a bankrupt under the Bankruptcy Act, 1869, if he commits an act of bankruptcy in England, although he may have left England before the petition for adjudication is presented. But he cannot be made a bankrupt upon an alleged act of bankruptcy committed abroad.

4. A non trader, a subject of, and domiciled in, Portugal, contracted a debt in England where he was temporarily resident. The creditor served him while in England with a writ issuing out of the Court of Exchequer. The alien entered an appearance to the writ, and left England for Portugal the next day, alleging as his reason

5 ENG. REP.] 115

for doing so that he had been disappointed of some money which he expected, and could not pay his way in England. He afterwards said that he had left England in consequence of being served with the writ:

Held, that there was no sufficient evidence that he left England in order to defeat and delay his creditors, and that no act of bankruptcy had been committed.

5. Although, in the case of a domiciled Englishman, the fact of his leaving England after service of a writ and so escaping a debtor's summons would afford a strong presumption that he intended to defeat and delay his creditors, yet the same presumption does not apply to a foreigner who is returning to his own country. *In re Crispin.* 600

6. A plea that the plaintiff's claim is founded on a contract giving the plaintiff a fraudulent preference over other creditors of a debtor in liquidation, must aver that proceedings in the liquidation had commenced or were imminent when the contract was entered into. *McKewan v. Sanderson.* 831

7. W. D, who had settled as a grazier in Australia, and had upon his own petition, been adjudicated an insolvent, and received his certificate there, afterwards visited England in 1868, and died there intestate, leaving a widow in Australia and creditors who had received only a small dividend on their debts. Under a settlement made on the marriage of the father and mother of W. D, the father, who died in 1869, had power to appoint a fund amongst his children, who, in default of appointment, were entitled equally. The power was not exercised. W. D's share of the fund had been paid into court. On a petition by the official assignee in the insolvency, it was held that he was entitled to the fund in court. *Matter of Davidson's Settlement.* 893

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BENEVOLENT SOCIETY.

1. By the rules of a friendly society, after payment of a year's subscription, "any member shall receive 8s. per week during any sickness or accident that may befall him, unless by rioting or drunkenness:"

Held, that insanity was "sickness" within the meaning of the society's rules. *Burton v. Eyden*. 246

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See CRIMINAL LAW, 470.

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BOTTOMRY.

1. A suit for necessaries was instituted in the Swansea County Court against the owners, unknown, of a foreign brig, which was, at the time of the institution of the suit, at Swansea. The suit was afterwards transferred to this court, and the plaintiffs filed their

petition. It appeared from the petition that the claim of the plaintiffs was for money advanced by them to execute necessary repairs to the brig at a British port, and that the money was advanced on the security of an instrument, by which the master of the brig pledged himself and vessel, and her owners, for the repayment of the money, except in case of the total loss of the vessel on her intended voyage:

Held, 1. That the claim set forth by the petition was founded on Bottomree; that the county court had no jurisdiction to entertain such a claim, and that as the cause was transferred to this court from the County Court, this court had no jurisdiction to entertain the suit. 2. That it was not competent to the plaintiffs, upon the facts stated in the petition, to waive the instrument of bottomree and insist on their claim for necessaries, because the claim for necessaries must be considered to be merged in the instrument of bottomree. *The Elpis*, 546

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See STOCKHOLDERS, 877.

BUILDING.

1. The corporation of Folkestone had power, under the Folkestone Improvement Act, 1855, to prescribe the line in which any house to be thereafter built or taken down for the purpose of being rebuilt or altered should be erected, on payment of compensation to the owner of any house required to be set back, and it was also provided that no new street to be thereafter laid out should be of less width than forty feet, inclusive of footways, and in the case of existing streets, houses to be thereafter erected were to be set back so as to allow of a width of forty feet:

Held, that a church was a house, and a perpetual curate in whom the freehold of the site was vested under 43 Geo. 3, c. 108, an owner within the meaning of the act.

2. A temporary church fronting to a road within the borough less than forty feet wide having been pulled down with a view to erecting a permanent church, the corporation gave notice to the clergyman in charge at the time, of a resolution passed by them that the road on which the church abutted must be not less than forty feet wide; but there was no statement that the additional width was to be gained on the side on which the church abutted, and it appeared that the street might have been widened on the side opposite without removing any buildings.

3. Afterwards, but not till the foundations of the new church had been put in, the corporation prescribed a line of building which came within the limits of the church as designed:

Held, that they were too late, and could not restrain the erection of the church in the manner in which it had been commenced. *Corporation of Folkestone v. Woodward.* 777

C.

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1. The defendants shipped coals on board the ship *Pitho* for Buenos Ayres, under a bill of lading making them deliverable to the consignees on payment of freight, and containing a memorandum: "The coals to be taken from the ship as soon as the master is ready to deliver, or to be landed at the expense and risk of the consignees."

The *Pitho* arrived at Buenos Ayres on the 28th of November, 1869, and the master was ready to deliver the coals on the 28d of December; but, no consignees appearing to claim them, he waited until the 20th of January, 1870, and then landed them. In an action against the defendants for damages for the detention of the ship at Buenos Ayres, it was left to the jury to say whether the defendants were responsible for the detention, and what would be a reasonable compensation for it. The jury found that the defendants were responsible for the detention, and they assessed the

damages at 56*l*. But the judge having, in answer to a question from one of the jury at the close of his summing-up, stated that, there being no evidence that there were warehouses at Buenos Ayres such as existed at Liverpool and other places, into which goods might be placed and kept subject to the shipowner's lien for freight, under the Merchant Shipping Act, 1862, the owners would lose their lien by landing the coals:

Held, That, inasmuch as this answer was too general in its terms, and might have to some extent affected the assessment of damages, the defendants were entitled to a new trial.

2. *Seem*, that although there was no "statutable" warehouse at Buenos Ayres, the master might still have landed the coals there without losing his possession and control over them (placing them in a warehouse belonging to or hired by his owners), and so have preserved his lien for freight. *Morse-le-Blanch v. Wilson.* 286, 288, *note*.

3. In an action against a hackney carriage proprietor for not securely carrying certain luggage belonging to a person who had hired his carriage, the declaration alleged that in consideration that the plaintiff would with her luggage become a passenger in such carriage, and of certain reward to be paid to the defendant by the plaintiff in that behalf, the defendant promised to carry the plaintiff and her luggage safely, and that the defendant not regarding his duty as hackney carriage proprietor nor his said promise did not safely carry the plaintiff's luggage, but so carelessly and negligently conducted himself that part of the said luggage was lost. The plaintiff having recovered the sum of 20*l*. in the action:

Held, that she was deprived of costs by the County Courts Act, 1867, s. 5, the cause of action as set forth in the declaration being founded on contract. *Baylis v. Lintott.* 319

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Venner's Estate, matter of, L. R., 6 Eq., 249, considered. 850
Ware v. Rowland, 15 Simmons, 587, considered. 746
Webb's Policy, matter of, 15 W. R., 529, disapproved. 694
Webb v. Sadler, L. R., 14 Eq., 533, disapproved. 66
Young v. Young, L. R., 13 Eq., 175, n., disapproved. 643

CHARGE.

See WILL, 789.

CHARITY.

See WILL, 664.

CHARTER PARTY.

See ADMIRALTY, 197.

CHATTEL.

See ASSIGNMENT, 719.

CHATTEL MORTGAGE.

See FIXTURES, 241, 246, *note*.

CHILD.

1. How far consent by, to assault excuses. 496

CODICIL.

See WILLS.

COMPENSATION.

1. A public body, with power by act of parliament to stop up, alter, or use, for the purpose of the authorized works, certain specified streets, were restrained by injunction from interfering, in excess of their powers, with the cellar of a house in one of the streets, the roadway of which was being lowered, until the amount of compensation for the whole house should have been ascertained and paid. An inquiry as to the damages sustained by plaintiffs, the owner and occupier of the house, by reason of the works commenced by defendants, having been directed by the decree:

Held, that plaintiff was not entitled to be compensated for the indirect injury to his trade, resulting from the diversion of traffic caused by the authorized act of lowering the roadway, but only for direct structural injury occasioned by the unauthorized interference with his cellar. *Bigg v. Corporation of London*. 887, 892, *note*.

2. The plaintiff was the occupier, under a lease for a long term, of premises in the city of London, where he carried on the business of a carman and contractor. Adjacent to these premises, but not actually touching them, a public highway being between, was a public draw dock communicating with the river Thames. The plaintiff had no right or easement to or in the dock other than his right as one of the public, but the plaintiff's premises, by reason of their proximity to the dock, and the access given thereby to and from the river, were rendered more valuable either to sell or occupy, with reference to the uses to which any owner might put them.

The Metropolitan Board of Works, in constructing the Thames Embankment under the powers conferred upon them by the Thames Embankment Act, 1862 (25 & 26 Vict. c. 93), which incorporates the Lands Clauses Consolidation Act, 1845, filled up the dock, and so cut off the access from the river to the public street adjoining the plaintiff's premises, which thereby became, as premises either to sell or occupy in their then state, and with reference to the uses to which any owner or occupier might put them, permanently diminished in value:

Held (by Kelly, C.B., Blackburn, J., Archibald, J., and Bramwell, B., Cleasby, B., dissenting, affirming the judgment of the court below), that the plaintiff's interest in the premises was injuriously affected within the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), s. 68, so as to entitle him to compensation. *McCarthy v. Metropolitan Board*. 256, 277, *note*.

COMPROMISE.

See BANKRUPTCY, 373.

CONCEALMENT.

See LIMITATIONS, STATUTE OF, 607.

CONCURRENT NEGLIGENCE.

See NEGLIGENCE.

CONFESSION.

See CRIMINAL LAW, 159, 167, *note*.

CONFLICT OF LAWS.

See DOMICIL, 673
LEX LOCI.

CONSENT.

1. How far by child excuses assault. 496

CONSEQUENTIAL DAMAGES.

See AUCTIONEER, 238.
PRESUMPTION, 228, 233, *note*.

CONSIGNOR AND CONSIGNEE.

See CARRIER, 286.

CONSTRUCTION.

See MINES, 125.
WILL.
WORDS.

CONTEMPT.

See CRIMINAL LAW, 443, 456.

CONTRACT.

1. When by letter or telegraph, completed. 686, 693, *note*.

See ADMIRALTY, 197
CARRIER, 319.

COPYRIGHT.

1. Where prints, engravings, and similar articles are the property of a trading firm, the proprietorship is sufficiently designated for the purpose of obtaining the protection of the Copyright of Designs Acts, by printing upon them the trading name of the firm, even though it does not contain the names of all the partners in the business. *Rock v. Lazarus*. 743

CORPORATION.

See CREDITORS, 251.
DIRECTORS, 304, 330.
FRAUD, 202.
STOCKHOLDERS.

COSTS.

1. If a rule for a new trial contains the term "costs to abide the event," the "event" whereon the costs will depend is the event of the fresh contest as to the particular ground of dispute in respect of which the court granted the rule. *Jones v. Williams*. 234

2. In an administration suit by a mortgagee who has obtained an order for sale of the real and leasehold estate for payment of his debt, the personal representatives of the testator are entitled, in case of deficiency of assets, to their own costs, charges and expenses, in priority to the plaintiff's costs of the sale. *Matter of Spensley's Estate*. 635

See CARRIER, 319.
FRAUD, 137.
PARTITION, 843.
STOCKHOLDERS, 1.
WILL, 518, 523.

COVENANT.

See MINES, 125.

CREDITORS.

1. A Turnpike Act, 4 Vict. c. xxxv., after reciting that the principal sum borrowed on the credit of the tolls under former acts still remained unpaid, together with arrears of interest thereon, and that such sums cannot be paid, nor the interest thereon discharged, nor the road kept in repair, without further powers by s. 18 enacted that all moneys received by the trustees "shall be applied in the first place in paying and discharging any interest which may from time to time be owing in respect of any money borrowed on the credit of the tolls; secondly, in maintaining and keeping the roads in repair; and thirdly, in reducing and paying off the principal sums borrowed." On an application under 4 & 5 Vict. c. 59, for an order for contribution from the highway rates:

Held, that the act did not authorize the payment of arrears of interest be-

fore repairing the road ; by Blackburn and Archibald, J.J. ; Quain, J., doubting. *Market, etc. v. Kettering, etc.* 251

See EXECUTORS AND ADMINISTRATORS. 844

FRAUDULENT CONVEYANCES.

CRIMINAL LAW.

1. *Admissions as witness.* According to the English law, introduced into Lower Canada at the time of the cession of Canada to England in 1763, and unaffected by subsequent Canadian or imperial statutes, the depositions on oath of a witness legally taken are admissible evidence against him, if he is subsequently tried on a criminal charge.

2. The only exception is, in the case of answers to questions which he objected to when his evidence was taken as tending to criminate him, but which he has been improperly compelled to answer.

3. A was indicted for felony. At the trial the crown put in evidence depositions sworn to by him, without being cautioned that what he so deposed to might be given in evidence against him, before fire commissioners empowered by the Quebec statutes, 31 Vict. c. 31, and 32 Vict. c. 29, to investigate the origin of any fires occurring in Quebec, and before any charge or accusation had been made against him.

Held, that the depositions were properly admitted as evidence against the prisoner at the trial.

4. *Seemle*: Chap. 77, s. 63, of the Consolidated Statutes of Canada, giving the Court of Queen's Bench power to direct a new trial, is repealed by the Canadian Statute, 32 and 33 Vict. c. 29, s. 80.

5. On petition by the attorney general of the Province of Quebec, special leave to appeal granted from a judgment of the Queen's Bench, Quebec, on a case reserved in a trial for felony. *Regina v. Coote.* 159, 161, note.

6. *Arson.* It is not necessary in a count in an indictment laid under sect. 7 of 24 & 25 Vict. c. 97, to allege an intent

to defraud, and it is sufficient to follow the words of the section without substantively setting out the particular "circumstances" relied on as constituting the offense.

7. Evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to. *Regina v. Heselbine,* 483

8. *Consent by child.* On an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault.

Held, on the latter count, although consent would be a defense, consent extorted by terror or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect.

9. *Quære*, If such consent can be given in such a case by a child, who is not *sui juris*? *Regina v. Woodhurst.* 406

10. *Conspiracy.* An indictment alleging a conspiracy to murder a living infant will not be supported by evidence of a conspiracy existing previous to the birth of such infant unless the agreement and intention continue subsequently to the birth.

11. A design by two persons, by different means, to murder a child of which a woman is pregnant, and expects soon to be delivered, is sufficiently proximate to be the subject of a conspiracy.

12. A wrote and put in the post office at H, at four o'clock one afternoon, a letter addressed to B, at W, containing a suggestion for the murder of a child to which B was expecting to give birth. The child was born at one A. M. on the following morning. The letter posted at H, would have been in the ordinary course, and was in fact delivered at the house where B lodged at eight o'clock on the morning of the day after it was posted at H. The letter never came to B's hands, being intercepted by the landlady of the house :

Held, on these facts, that the jury might find that the act of A continued until the letter was delivered at the house of B, and if the letter had reached B, that A might properly have been convicted of soliciting and inciting B to murder her child, and, the letter having been intercepted,

that A could be convicted of an attempt to solicit and incite B to murder her child. *Regina v. Banks.* 471

13. *Contempt.* It is a contempt of court, while a criminal charge is pending, to impugn the honesty and impartiality of the judge by whom it is to be tried, or to attempt to obstruct the course of justice by exciting public prejudice against it.

14. But it is not a contempt merely to solicit subscriptions for the defense of a defendant on a criminal charge. *Regina v. Skipworth.* 456

15. *Contempt.* The defendant had been committed for perjury by the judge, who tried an ejectment in which he was claimant, and in which the issue was the question of his identity with a certain baronet alleged by the defendants to be dead. The jury, during the defendant's case, had expressed themselves satisfied that the claimant was not the person he swore he was, and he elected to be non-suited. The grand jury at the Central Criminal Court found true bills against him for perjury and forgery; the prosecution removed the indictments by *certiorari* into this court; and it had been fixed, upon application of the attorney-general, that the trial should take place at bar next Easter term. The defendant and his friends, amongst whom were two members of parliament and one barrister-at law, had held public meetings for the purpose of obtaining money for the defense at the forthcoming trial, and remarks had been made by the defendant and the three friends mentioned, imputing perjury and conspiracy to the witnesses for the defense at the trial of the ejectment, and prejudice and partiality to the lord chief justice of this court, who, they said, had proved himself unfit to preside at the trial of the indictments. They also asserted the innocence of the defendant, and the injustice of his treatment.

Held, that the trial of these indictments was a proceeding of the court then pending; that, although the remarks at the meetings might be the subject of a criminal information, yet the parties who made them might also be prosecuted summarily for contempt of court; that these remarks indicated an attempt by means of vituperation to deter the lord chief justice from taking any part in the trial, and

also by attacks on the witnesses themselves to influence the public mind and prejudice the jury; that they unwarrantably interfered with the even and ordinary course of justice; that it was no excuse that the motive or purpose for which the meetings were held was justifiable, nor that the attempt to interfere with the course of justice was ineffectual; that the proceedings were a gross contempt of court; and that it was the duty of the court to put a stop to them.

16. The members of parliament who made these remarks, when summoned to answer for contempt, apologized and submitted themselves to the court. They were, therefore, only fined 100*l.* each; but it was held that the court would not allow the privilege of the house of commons to prevent punishment by imprisonment of its members for a contempt in the administration of justice, if the occasion required it. *Regina v. Onslow.* 443

17. *Embezzlement.* The prisoner was engaged by the prosecutors to solicit orders for them, and was to be paid by commission on the sums received through his means. He had no authority to receive money; but if any was paid to him, he was forthwith to hand it over to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty he applied for payment of a certain sum; having received it, he applied it to his own use, and denied, when asked, that it had been paid to him:

Held, on the above facts, that the prisoner was not a "clerk or servant" within the meaning of 24 & 25 Vict. c. 96, s. 68. *Regina v. Negus.* 403

18. *Embezzlement.* The prisoner was captain of a barge, and in the exclusive service of its owner. He was remunerated with half the earnings of the vessel, and had no authority to take any other cargoes but those appointed for him. It was his duty to account to his master for the proceeds of each voyage. On one occasion, although ordered to bring the barge back empty from a certain place, and forbidden to take a particular cargo, he, nevertheless, loaded such cargo in the barge, returned therewith, and received the freight. He

did not profess to carry the cargo or receive the freight for his master, and the person paying the money did not know for whom he paid it. The prisoner declared that the barge came back empty, and never accounted for the freight:

Held, that he was not guilty of embezzlement, as the money was not received or taken into possession by him "for, or in the name of, or on the account of his master or employer," within 24 & 25 Vict. c. 96, s. 68. *Regina v. Cullum*. 397, 402, note.

19. *Escape*. W was given into custody without a warrant on a charge of felony. He was conveyed before a magistrate, who remanded him in custody without any evidence on oath. W was removed to a lock-up from which he escaped. The charge of felony made against him was dismissed by the magistrates.

Held, (per Martin, B.), that the dismissal by the magistrates was not equivalent to an acquittal by a jury, that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand, and that these facts were no defense to the indictment for breaking prison. *Regina v. Waters*. 469

20. *Evidence*. Where a prisoner was charged with the murder of her child by poison, and the defense was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible. *Regina v. Cotton*. 470

21. *False Pretenses*. The prisoner was indicted, under 24 & 25 Vict. c. 96, s. 95, for unlawfully receiving goods knowing them to have been obtained by false pretenses. The indictment did not set out the false pretenses. At the trial, at the close of the case for the prosecution, it was objected, on behalf of the prisoner, that the indictment was bad, because it did not set out the false pretenses. The prisoner was convicted:

Held, that the objection must be taken to have been made after verdict in arrest of judgment; and that after verdict the indictment was good. *Regina v. Goldsmith*. 437

22. *False Record*. Upon an indictment 5 ENG. REP.] 116

ment under 24 & 25 Vict. c. 98, s. 37, for making a false entry in a marriage register, it is not necessary that the entry should be made with intent to defraud, and it is no defense that the marriage solemnized was null and void, being bigamous. If a person knowing his name to be A signs another name without authority, he is guilty, and it is immaterial that he is a third witness, the Marriage Act only requiring two. *Regina v. Asplin*. 470

23. *Forgery*. By 24 & 25 Vict. c. 98, s. 20, it is felony to forge "any deed, or any bond or writing obligatory:"

Held, that a letter of orders under the seal of a bishop is not a deed within that section. *Regina v. Morton*. 393

24. *Homicide while resisting officer*. If a prisoner, having been lawfully apprehended by a police-constable on a criminal charge, uses violence to the constable, or to any one lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily injury, he is guilty of murder: And so, if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury, it would be manslaughter. *Regina v. Porter*. 497

25. *Knowledge*. By the Animals Order, 1871, made by the Privy Council under the 75th section of the Contagious Disease (animals) Act, 1869, it is provided that every person having in his possession or under his charge an animal affected with a contagious or infectious disease shall, "with all practicable speed, give notice to a police constable of the fact of the animal being so affected."

Held, that in order to convict the person in possession or charge of a diseased animal of an offense against the order, it must be proved that he was aware of the fact that the animal was diseased. *Nichols v. Hall*. 300

26. *Larceny*. The prisoner was a depositor in a Post Office Savings Bank, in which 11s. stood to his credit. He gave notice in the ordinary form to withdraw 10s., stating in his notice the number of his depositor's book and the amount to be withdrawn. A warrant for 10s. was duly issued to the prisoner, and a letter of advice was duly sent to the post office at N., to

pay the prisoner 10s. He went to that office, and handed his depositor's book and the warrant to the clerk. But the clerk, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8l. 16s. 10d., and placed the latter amount upon the counter. The clerk entered the amount paid 8l. 16s. 10d., in the prisoner's depositor's book and stamped it. The prisoner took up the money and went away, having at the moment of taking it up an *animus furandi*, and knowing the money to be the money of the postmaster-general.

Held, by Cockburn, C.J., Bovill, C.J., Kelly, C.B., Blackburn, Keating, Mellor, Lush, Grove, Denman, and Archibald, J.J., and Pigott, B. (Martin, Bramwell, and Cleasby, B.B. and Brett, J., dissenting) that prisoner was guilty of larceny:

By Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, J.J., on the ground that even assuming the clerk to have the same authority to part with the possession of and property in the money which the postmaster-general would have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property; and the possession being obtained *animo furandi*, there was both a taking and a stealing within the definition of larceny:

By Bovill, C.J., Kelly, C.B., and Keating, J., on the ground that the clerk had only a limited authority to part with the money to the person named in the letter of advice, and therefore no property passed to the prisoner, and the possession was obtained *animo furandi*:

By Pigott, B., on the ground that the mistaken act of the clerk in placing the money on the counter stopped short of placing it completely in the prisoner's possession, and that his subsequently taking it up was larceny:

Held, by Martin, Bramwell, and Cleasby, B.B., and Brett, J., that the prisoner was not guilty of larceny. *Regina v. Middleton*. 406

27. *Legacy to Felon*. A married woman was convicted of felony and transported to Australia for seven years, where she was lost sight of, and nothing had been heard of her since 1843. In 1860 a legacy to which she was entitled under a will made in 1837

became payable, and the husband now moved for a grant of administration.

Held, that the grant could not be made until a notice had been given to the queen's proctor. *Goods of Stevens*. 468

28. *Libel*. Where newspaper articles charged the relator with partiality from political motives, in the manner in which he discharged his duties as presiding officer at an election for members of a school board, and mentioned a specific instance where he had rejected the vote of a duly qualified female voter, who was politically opposed to him, though the relator in his affidavit denied generally the truth of all the charges, and also denied that he refused any voter on political or improper or illegal considerations, or prevented directly, or indirectly any voter, who was legally qualified to vote and who observed the prescribed regulations, from voting, or put any obstacles in the way, or did anything, at any time, calculated improperly to affect the election of any particular candidate.

29. The court discharged a rule *nisi* for a criminal information which had been obtained against the publisher of the newspaper, because the relator had not negatived specifically the charge made against him as to the rejection of the female voter's vote. *Regina v. Aunger*. 486

30. *Variance*. The prisoner was indicted, under 24 and 25 Vict. c. 97, for setting fire to a stack of straw. It was proved that he set fire to a quantity of straw on a lory:

Held, that he could not properly be convicted. *Regina v. Satchwell*. 393

D.

DAMAGES.

1. An action at law was by consent of the parties referred, and the arbitrator awarded and ordered that the defendant in the action should pay to the plaintiff in the action an annuity of £1200 a year for life, and that, "in order to secure the annuity," the de-

fendant should, within two months, purchase and convey to trustees, on behalf of the plaintiff, a government annuity of £1200 a year, and that if for any reason the annuity should not have been legally secured before the last day of the second month from the date of the award, then, in addition to the annuity, a further sum of £100 should become due and payable by the defendant to the plaintiff on the last day of the second month, and a like sum of £100 on the last day of each successive month, until such annuity should be legally secured; and the award added: "these monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same."

No annuity, as directed by the award, having even been purchased; the plaintiff having been adjudicated a bankrupt; the defendant having died; and the £1200 a year and £100 a month having been regularly paid to the plaintiff and her assignees up to the defendant's death, but not since; upon claim by the assignees to prove against the defendant's estate for the payments due in respect of the annuity, and of the monthly payments accrued due since his death:

Held, that the £100 a month, though called a penalty, was not to be regarded strictly as such; and that the assignees were entitled to prove for the arrears both of the annuity and the £100 a month. *Parfitt v. Chambre*. 701

2. Where coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser (in the absence of any suggestion of fraud), will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal. *Matter of United, etc., Collieries Co.* 707

See AUCTIONEER, 238.

COMPENSATION, 256, 277, *note*, 887, 892, *note*.

PRESUMPTION, 228, 228, *note*.

DEED.

See CRIMINAL LAW, 393.

DEFENDANT.

1. May obtain a *ne exeat* against a co-defendant. *Sobey v. Sobey*. 805

DEMURRER.

1. Whether a *bond fide* purchaser can raise the question by demurrer or must plead the facts? *Vane v. Vane*. 607

See EQUITY, 596.

FRAUDS, STATUTE OF, 581.

DENIAL.

See ALTERATION, 361.

DIRECTORS.

1. The 88th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), which provides for the disclosure in the prospectus of a company of certain particulars with regard to the class of contracts specified in the section, is applicable only for the protection of shareholders in the company, and creates no statutory duty towards bondholders of the company or others for breach of which an action on the statute will lie:
2. *Quere*, as to the nature of the contracts to which the provision is applicable.
3. *Semble*, per Honyman, J., that the section creates no statutory cause of action, but merely amounts to a declaration that, as between shareholders and those issuing the prospectus, the latter shall be deemed to have acted fraudulently. *Cornell v. Hay*. 804
4. The plaintiff having lost his goods at a hotel, of which a company were proprietors, sought to recover their value in an action against the paid manager

in whose name the justices' license had been granted:

Held, that the company were the real "innkeepers;" and, therefore, that the action was not maintainable. *Dixon v. Birch*. 330

See STOCKHOLDERS, 1, 658.

DISAFFIRMANCE.

See BANKRUPTCY, 323
FRAUDS, STATUTE OF, 581.
INSURANCE, MARINE, 382.

DISCOVERY.

1. A plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information, and belief, contain anything impeaching his case, or supporting or material to the case of the defendant.
2. A plaintiff will not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit, although made before any litigation was in contemplation. *Minet v. Morgan*. 590
3. Bill by a reversioner against overholding tenants under expired underleases, alleging that, the defendants were wrongfully in possession of certain parcels comprised in the original lease, and had in their possession divers documents which would show that the said parcels were comprised in the said lease and the underleases, but refused to produce them, and were colluding together to defeat the plaintiff. The defendants demurred generally and for multifariousness, but the court overruled the demurrers.
4. Identity is as much matter of title as devolution. *Brown v. Wales*. 771

See ATTORNEY, 836, 838, *note*.
PATENT, 750.

DIVORCE.

See ALIMONY.

DOMICIL.

1. By a marriage settlement executed in England, the husband assigned to trustees (all domiciled and resident in England) an English policy of assurance, effected on his own life for £2,000, payable at the expiration of six months after his death, and a sum of £1,047 8s. 8d. consols, and covenanted to pay to the trustees within three years a sum of £1,000; and it was declared that the policy moneys and the £1,000 should be held upon trusts for investment and payment of the income to the wife for life, and then to the husband for life, and then for division among the children of the marriage. The husband died within three years, having been at the time of his marriage, and thenceforth, up to the time of his death, domiciled in New South Wales. The wife survived only three months, and left one child, the plaintiff, who was also domiciled abroad. At the time of the wife's death neither the policy moneys nor the £1,000 covenanted to be paid to the trustees of the settlement had been paid to them:

Held, on the authority of *Attorney-General v. Campbell* that succession duty was payable by the plaintiff on the funds to which he became entitled under the settlement.

2. By his will, the husband appointed trustees and executors in New South Wales to collect his residuary estate (which was all locally situate in that country), and transmit the same to trustees and executors in England, who were to invest the funds so transmitted in government funds or real securities, and pay the income to his wife for her life, and after her death to divide the same among the children. At the time of the wife's death, no part of the residuary estate had reached the hands of the English trustees, but large remittances were afterwards made to them:

Held, that no succession duty was payable by the plaintiff on the funds to which he became entitled under the will. *Lyall v. Lyall*. 673

See BANKRUPTCY, 892.

E.

ELECTION.

See BANKRUPTCY, 323.
FRAUDS, STATUTE OF, 581.
INSURANCE, MARINE, 382.
WILL, 397.

EMBEZZLEMENT.

See CRIMINAL LAW, 397, 402, 403, *note*.

EMINENT DOMAIN.

See COMPENSATION, 256, 277, *note*, 387, 392, *note*.

EQUITY.

1. In a bill filed to restrain an action at law the statements were as follows: In the voluntary winding up of a joint stock company a sum of £500 was awarded to the defendant as compensation for his loss of salary as secretary of the company. The defendant was at that time indebted to the company in a larger sum than £500, and the plaintiff, who was the liquidator of the company, accordingly wrote to the defendant informing him of the award, and asking him to pay the balance due from him after setting off the £500 so awarded. The defendant brought an action against the plaintiff, seeking to make him personally liable for the sum of £500, as money had and received to the defendant's use. The bill prayed a declaration that the defendant was not entitled to the payment of the £500 without settling the debt due from him to the company, and that the action might be restrained. The defendant demurred for want of equity:

Held (reversing the decision of *Makins*, V.C.), that as the bill disclosed a good defense at law to the defendant's action there was no ground for relief in equity and the demurrer was allowed. *Kemp vs. Tucker*. 597

See LIMITATIONS, STATUTE OF, 601.

ESCAPE.

See CRIMINAL LAW, 469.

ESTATES TAIL.

See WILL, 792.

EVIDENCE.

1. Of experiments made subsequently to a fire is admissible in order to show the way in which the building was set fire to. *Regina v. Heseltine*. 483
 2. Where it is a question whether poison was accidentally or intentionally administered the prosecution may show that others had previously died in same house from the same poison. *Regina v. Cotton*. 479
- See* CRIMINAL LAW, 159, 167, *note*.
WILL, 518.

EXCEPTION.

See MINES, 125, 311.

EXECUTORS AND ADMINISTRATORS.

1. Proceedings in Chancery having been taken by persons having claims upon the estate of an intestate, against his widow, who was alleged to have possessed herself of part of the estate, but who had not taken out administration, the Court of Chancery appointed a receiver, with authority to collect, get in, and receive the estate, and to apply to the Court of Probate for administration. The widow, and all the next of kin and persons entitled in distribution having been cited, upon their non-appearance to the citation, the court made a general grant of administration to the receiver. *In re Goods of Mayer*. 533
2. The Court of Probate cannot pass over an executor by reason of his bad character only; he must also be resident out of the United Kingdom at

the time of the death of the deceased, in which case it may make a grant of administration, under 20 & 21 Vict. c. 77, s. 73, to some other person with such limitations as it may think fit. *In re goods of Samson.* 540

3. The court will not, at any rate without notice, pass over the widow, who has been legally separated from her husband by reason of her cruelty, in granting administration to his estate. *In re goods of Ihler.* 548

4. To a bill alleging that the defendant is executor of a testator, and had, before probate, possessed himself of part of the personal estate, and praying for general administration, a plea that the defendant is not executor is a complete answer. *Cary v. Hills.* 727

5. A testator having directed his executors, at their discretion, either to wind up or to continue his business (that of a clothier), with power to apply the capital employed in the business in carrying it on, and to employ in such business any money, part of his general estate, the executors elected to continue the business, but did not, as they said (and the contrary was not proved), employ more of the assets in carrying on the business than were so employed at the testator's death.

Upon bill by a person alleging himself to be a creditor of the business since the death, on behalf of himself and all the other creditors of the testator, seeking administration of the testator's estate which had been employed in the business, there being no suggestion of insolvency:

Held, that the remedy of the plaintiff was not an administration decree in this court, but an action at law. *Owen v. Delamere.* 765

6. By the statute 32 & 33 Vict. c. 46, the distinction between specialty and simple contract debts in the administration of assets of deceased persons is abolished, but a creditor who first takes legal proceedings against the legal personal representative, and obtains judgment, is, though it be not registered, entitled to be paid his debt in full in priority over all other creditors. *Williams v. Williams.* 844

See COSTS, 685.

TRUSTEES, 808

F.

FALSE PRETENSES.

See CRIMINAL LAW, 437.

FALSE RECORD.

See CRIMINAL LAW, 470.

FELON.

1. To whom legacy to goes, and how administration is obtained. *Matter of Stevens.* 468

FENCE.

See PRESCRIPTION, 228, 233, note.

FICTIONITIOUS CASE.

See JURISDICTION, 730, 735, note.

FILING.

See FIXTURES, 241, 246, note.

FIXTURES.

1. H, a lessee for years, demised by indenture of mortgage to the plaintiffs certain buildings used as an iron factory for the residue of the term, except the last two days, and by the same indenture he also assigned to the plaintiffs all the machinery, plant, fixtures, implements, utensils, and effects, then or thereafter to be fixed to or used in or about the buildings, subject to redemption on payment of the mortgage money and interest:

Held, that the indenture, being an assignment of fixtures, was an assignment of personal chattels within the Bills of Sale Act, and required registration. *Hawtry v. Butlin.* 241, 246
note

FOREIGN COURTS.

See BANKRUPTCY, 892.
LEX LOCI, 734.

FOREIGN WILL.

See LEX LOCI.

FORGERY.

See CRIMINAL LAW, 393, 470.

FORMER SUIT.

1. Where an action is brought against A to recover unliquidated damages for which he has become liable through the default of B, notice being given to B (who declines to intervene), A is justified in defending the action, and is not bound to let judgment go by default, or to pay money into court.

The proper questions for the jury in such a case are, whether it was a reasonable thing to defend the action, and whether the defense was conducted in a reasonable manner. *Mors-le-Blanch v. Wilson*, 286, 299, note

See LEX LOCI, 502.

FRAUD.

1. If the relief sought by the bill is based on fraud, the failure to prove it is fatal: but if by striking out of the bill the charge of fraud there is sufficient equity stated and proved, and the charge of fraud is only subsidiary, it is a matter only affecting costs. *London Chartered Bank of Australia v. Lamprière*. 137
2. The plaintiff sued W & G jointly, for a false representation with respect to the solvency of R. The defendant W, was sued as the public officer of a banking company, formed under 7 Geo. 4, c. 46, and the defendant, G, was the manager at one of their branches. The plaintiff was a customer of the S bank, and requested the manager of that bank to inquire for him as to R's credit. The manager wrote a letter addressed to "the manager" of the defendants' banking company, requesting information whether R was responsible to the extent of 50,000l.

The defendant, G, wrote a letter, which he signed as manager, giving a favorable reply as to R's responsibility. The plaintiff, in consequence of this letter, supplied R with goods, for which he never was paid in consequence of R's insolvency. The statement made by G was false to his knowledge. The defendants' banking company had no knowledge, otherwise than through G, that such a letter had been written, and gave him no express authority to write the letter, but the writing of such a letter was an act done within the scope of the general authority conferred on G as manager:

Held, first, that the signature of G as manager was the signature not merely of an agent, but of the defendants' banking company itself, and therefore the signature of the party to be charged within s. 6 of 9 Geo. 4, c. 14, s. 6, so as to make the banking company liable for his false representation.

3. Secondly, that the letters showed that the communications were between the two banks; and the representation was not merely the representation of G personally, but of the defendants' banking company.
4. Thirdly, that inasmuch as it is usual for the customers of a bank to make inquiries like that made by the plaintiff, it must be taken to have been within the contemplation of the defendants that the inquiry as to R's solvency might have been made on behalf of a customer of the S bank, and that the representation might be communicated to him; and that the representation might be communicated to him; and that the banking company and G were liable to the plaintiff, he being the customer who had made the inquiry.
5. Fourthly, that, on the authority of *Barwick v. English Joint Stock Bank* (Law Rep., 2 Ex., 259), the banking company was liable for the false representation of its manager, made in the course of conducting the business of the bank.
6. Lastly, that, as all persons directly concerned in the commission of a fraud are to be treated as principals, the banking company and G might be sued jointly. *Swift v. Winterbotham*.

See BANKRUPTCY, 600.
DIRECTORS, 304.
INSURANCE, MARINE, 278, 332.
LIMITATIONS, STATUTE OF, 607.

FRAUDULENT CONVEYANCE.

1. A bill of sale was executed on the 9th of January, 1872. On the 23d of January the grantor filed a petition for liquidation. On the 30th of January the bill of sale was registered, and on the 12th of February the trustee under the liquidation took possession of the property. The bill of sale provided that the grantor should continue in possession of the property until default in payment upon demand of what should be due to the grantee. The grantor remained in possession of the property until the 12th of February, no demand for payment or possession having been made by the grantee. On that day the grantee authorized an agent to take possession, but no possession was taken by him:

Held (reversing a decision of the County Court judge at Manchester), that the trustee was entitled to the property as against the bill of sale holder.

2. Goods comprised in a bill of sale, which entitles the holder to take possession upon default in payment after demand, remain, notwithstanding the registration of the bill of sale, until demand is made in the reputed ownership of the grantor. *Ex parte Harding*. 816

FRAUDS, STATUTE OF.

1. The plaintiffs agreed to purchase an estate from the L Society, and to pay a deposit on the signing of the contract. Before it had been signed the plaintiffs verbally agreed with B to make it over to him on certain terms. In order to enable B to deal with the L Society, the plaintiffs signed and gave to him a memorandum, making over the contract to him in consideration of his paying to the L Society the deposit, and engaging to pay a certain sum to the plaintiffs; the other terms of the bargain between the plaintiffs and B, which were in favor of the plaintiffs, being at B's request omitted from the memorandum. On

the same day the contract between the plaintiffs and the L Society was signed, and the part signed by the L Society was given to B who paid the deposit. B afterwards repudiated all the stipulations in favor of the plaintiffs which had not been inserted in the memorandum. The plaintiffs then filed their bill against B and the L Society, asking to have the memorandum between B and the plaintiffs cancelled, and for a conveyance from the society on payment of what was due to them.

Held (affirming the decision of Malins, V.C.), that a demurrer by B was not sustainable on the merits, for that the memorandum was only ancillary to the verbal agreement between the plaintiffs and B and any use of it by B for a purpose inconsistent with that agreement was fraudulent:

2. *Held*, further, that if the plaintiffs could have maintained a bill for specific performance of the parol agreement between them and B, on the ground that it had been in part performed, as to which *quære*, they were not bound to do so; but that, as B had repudiated that agreement, they were entitled to fall back on their original rights under the agreement with the L. Society:
3. *Held*, further (differing from Malins, V.C.), that the bill was not demurrable for want of an offer to repay to B what he had paid to the society. *Jervis v. Berridge*. 581

See BANKRUPTCY.

FREIGHT.

See ADMIRALTY, 522.
CARRIER, 286.

G.

GAS COMPANY.

1. A municipal corporation having, under the provisions of an act of parliament, bought up a gas company which previously supplied gas to the borough, and which had compulsory powers for the purpose within the

borough, commenced supplying gas to an adjoining township, in which another gas company already existed having similar powers, within the township. The gas company of the township having filed a bill against the corporation to restrain them from supplying gas within the township, and alleging as a personal injury which entitled them to maintain their suit, that the corporation had contracted to supply gas to a particular manufactory within the township which otherwise they must have supplied, and that they had thereby been deprived of the profits arising from the supply of gas to the manufactory, and that great loss would be sustained by them :

Held, on demurrer, that the injury alleged was not such as entitled the plaintiffs to maintain the suit. *Pudsey Gas Company v. Corporation of Bradford.* 784

GUARANTY.

1. A guaranty to continue in force until six months after notice in writing under the hand of the guarantor of his intention to discontinue the same :

Held, to be determined by notice of the death of the guarantor. *Harris v. Fawcett.* 860

GUARDIAN.

See PARTNERSHIP, 654.
SPECIFIC PERFORMANCE 850.

H.

HEIRS.

See WILL, 746.

HOMICIDE.

1. While resisting an officer. 497

See MURDER.

5 ENG. REP.] 117

HUSBAND AND WIFE.

1. On a marriage in 1862, the parties having no property, no settlement was made; but the husband, at the wife's request, gave up an appointment producing more than £300 a year. In the same year the wife's mother settled funds producing about £1,000 a year on the wife for life, for her separate use, with remainder to the children, giving the husband £200 a year for life after the death of his wife; and shortly afterwards she gave the wife a further income of above £700 a year for her separate use. The wife allowed the husband £100 a year till 1865, when they ceased to live together. In December, 1870, he obtained a decree for restitution of conjugal rights, and a separation deed was thereupon executed by which she agreed to give him an annuity of £300 a year, and to maintain their two children while with her, his rights as to her unsettled property not being affected. At this time the wife had saved about £6,000 out of her separate income. It appeared that the husband was not to blame in the disputes. A sum of £6,000 having devolved upon the wife under the intestacy of a relation :

Held (affirming the decree of *Mullins, V.C.*), that the wife was not entitled to any settlement out of this sum. *Giacometti v. Prodgers.* 571

I.

ILLEGAL CONTRACT.

See ADMIRALTY, 197,

ILLEGAL RESTRAINT OF TRADE.

1. A covenant by a clerk and traveler with a firm of brewers that he would not during his service or within two years afterwards, either directly or indirectly, sell, procure orders for, or recommend, or be in anywise concerned or engaged in the sale or recommendation, either on his own account, or for any other person, public company or corporation, of any Burton ale or porter brewed at Burton, or

offered for sale as such, other than the ale, beer, or porter brewed by the plaintiffs:

Held, void, as unnecessarily extensive. *Alsopp v. Wheatcroft*. 714

INDICTMENT.

See CRIMINAL LAW, 300, 392, 437.

ILLEGITIMATE CHILDREN AND RELATIVES.

1. When not included in legacy. 884.

INFANT.

1. An infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, and executed a statutory declaration stating (untruthfully) that he was then of full age. After attaining twenty-one he mortgaged his interest in the fund for an amount exceeding what was ultimately available without disclosing the fact of the prior charge:

Held, that the charge given by the infant during his infancy and incapacity to contract was avoided by the subsequent mortgage executed by him when of full age and capable of contracting, to a mortgagee without notice. *Inman v. Inman*. 838

2. On an application by an infant for maintenance, the court has jurisdiction, without suit, to charge the expenses of his past maintenance and the costs of the application on the *corpus* of a freehold estate to which he is entitled in fee. *In re Howarth*. 632, 635, note

See PARTITION, 848.

SPECIFIC PERFORMANCE, 850.
STOCKHOLDERS, 877.

INSANITY.

See BENEVOLENT SOCIETY, 246.

INSOLVENCY.

See BANKRUPTCY.

INSURANCE, LIFE.

1. A policy effected by A on his life was mortgaged in 1860 without notice to the office. A became bankrupt in 1862, and in 1868 joined in a transfer of the mortgage to B, who had no notice of the bankruptcy. After the death of A, B's solicitor gave notice to the office that this and other policies were mortgaged, and that he acted for the mortgagees, not naming them. Subsequently notice of the bankruptcy was given to the office:

Held, that this was sufficient to give priority to B over the creditors in the bankruptcy of the assured. *Russell's Trust*. 694

INSURANCE, MARINE.

1. It is a principle of insurance law that no abandonment is necessary where there is nothing which, on abandonment, can pass to or be of value to the underwriters. Where, therefore, there was a policy on ship, and also on charterparty freight (that is freight to be earned by the carriage homeward of a cargo chartered to be put on board at a distant port), and the ship was so injured on the outward voyage that the shipowner abandoned to the underwriter on ship, there was nothing to pass to the underwriter on charterparty freight, and, consequently, there was no necessity for abandonment to him.

2. The damage to the ship from perils of the sea during the voyage, covered by the policy on ship, being such as to justify abandonment to the underwriter on ship before the cargo was put on board, the insured freight could not be earned, and there would therefore be a total loss on the policy on freight.

A ship sailed on its outward voyage to New Zealand. More than a month afterwards the owners chartered it to M to bring home a cargo from Calcutta. By this charterparty, after discharging at New Zealand, it was to sail to Calcutta, and being there "tight, staunch, and strong, and everyway fitted for the voyage," the charterer bound himself to put on board a specified cargo for England at a stipulated freight. The owners then effected a policy, in the usual form, against perils of the sea, &c.

upon the freight to be earned on this homeward voyage.

The ship was seriously injured in the outward voyage; it was repaired as well as the master, with insufficient funds, and at a place not capable of making full examination and effecting complete repairs, could get it repaired; and with the ship thus partially repaired he sailed from the place where the ship then was, and arrived at Calcutta, where the fullest examination and the completest repairs could be had. He immediately tendered the ship to the agents of the charterers for the homeward cargo. They, on the ground that the charterer had become bankrupt, refused to load a cargo. The master then had the ship fully examined, and it was found that the injuries on the outward voyage had been such that the complete repair of the ship, to render it fit for the voyage home, would exceed the value of the ship when repaired, and the amount of freight to be earned. The owners, on receiving this intelligence, abandoned:

Held, that this was a loss of freight occasioned by the perils of the sea:

8. *Held*, also, that no notice of abandonment to the underwriters on freight was necessary:

4. *Held*, also, that, if a notice of abandonment to the underwriters on freight had been necessary, the notice here would not, under the circumstances, have been too late. *Rankin v. Potter.* 40

5. A proposal for insurance on freight was made and accepted on the 11th of March. On the 16th the ship was lost. On the 17th the assured, with knowledge of the loss, but without communicating it to the insurers, demanded a stamped policy. The insurers then for the first time required to be informed as to the amount of insurance upon the hull, and inserted in the policy (which the assured accepted) the following warranty,—"Hull warranted not insured for more than 2700*l.* after the 20th of March."

The vessel was in fact insured for an additional 500*l.* in an insurance club, by the rules of which all ships belonging to members were insured from the 20th of March in one year to the 20th of March in the following year, "and so on from year to year

unless ten days' notice to the contrary be given," and in the absence of notice the managers were to "renew each policy on its expiration."

Held, that, notwithstanding those rules, regard being had to the stat. 30 & 31 Vict. c. 23, ss. 7-9, the club-policy was not a continuing policy beyond the 20th of March of the current year, and that, the ship having been lost before that day, no new effective policy could have been made, and consequently that the warranty was complied with.

6. *Held*, also that, the risk having been accepted by the insurers on the 11th of March, the addition on the 17th of a term for their benefit, and not affecting the risk, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th, and therefore, upon the authority of *Cory v. Patton* (Law Rep., 7 Q. B., 804), the non-communication of the loss was not a concealment of a material fact so as to avoid the policy. *Lishman v. Northern Maritime, etc.* 278

7. The plaintiffs effected a policy of insurance with the defendants upon a ship at and from Liverpool to the west or south-west coast of Africa, "during her stay and trade there," and back to a port of call in the United Kingdom, at 8*l.* 8*s.* percent, returning a percentage varying with the period of the risk, the ship being held covered at 13*s.* 4*d.* percent per month if more than twelve months out.

The ship proceeded to the African coast, and, after being loaded for the return voyage, remained at a port there for some weeks for a purpose in no way connected with trade. She was subsequently lost on the voyage home.

At the trial of an action on the policy, the judge ruled that, as the delay had not been for a trade purpose, there had been a deviation, and directed a verdict for the defendants. On the argument of a bill of exceptions tendered to this ruling:

Held, a proper direction. *Company of African Merchants v. British, etc.* 846

8. The plaintiff's insurance broker effected an insurance with the defendants on the chartered freight of the plaintiff's ship *Cambria* without disclosing to the defendants certain in

formation in his possession, which it was material that they should know (October 10th). In so doing he acted in good faith, supposing from inquiries that he had made that the information was incorrect. After initialing the slip, but before executing the policy, the defendants (October 13th) became possessed of the information which the broker had not disclosed; and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void (October 14th or 15th). Upon receiving news of the loss of the vessel, they gave notice to the plaintiff that they did not consider the policy binding on them (October 20th). On the trial of the action upon the policy, the learned judge directed the jury (in substance) that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opinion, whether the defendants had elected to go on with the policy. The jury having found that the defendants did not so elect, and a rule for a new trial on the ground of misdirection having been obtained and afterwards made absolute in the court below:

Held (reversing the judgment of the court below), that this direction was right; and that there being no election in fact, and no evidence that the plaintiff had been prejudiced by the defendants not electing earlier to disaffirm the policy, the defendants were not estopped from denying its validity, nor was it material to consider whether their conduct in delivering out the policy without a protest had been such as to entitle the plaintiff to consider it as an election. *Morrison v. Universal Ins. Co.* 382

INTENT.

CRIMINAL LAW, 300, 470, 479.

INTERNAL REVENUE.

See LICENSE, 249.

J.

JOINT LIABILITY

See FRAUD, 202.

JUDGMENT IN REM.

See LEX LOCI, 502.

JURISDICTION.

1. On a special case raising questions of legal limitations at the instance of a plaintiff not in possession, the court declined to make any order or to entertain any fictitious question as to title deeds or accounts in order to found jurisdiction. *Pryse v. Pryse*.

730, 735, *note*

See ADMIRALTY, 550, 552.
 BOTTOMERY, 546.
 EQUITTY, 596.
 LEX LOCI, 502, 724.
 SERVICE, 342.

L.

LACHES.

See BUILDING, 777.

LANDLORD AND TENANT

See MINES, 114.

LARCENY.

See CRIMINAL LAW, 406.

LAW.

See EQUITTY, 596.

LEASE.

See MINES, 114.

LEGACY.

1. When one to wife absolute although, if anything left, directed to be divided between children. *Crozier v. Crozier*. 849

2. To each of my four nieces, testator had five, each entitled to. *McKeehn v. Vaughan*. 854

3. By a will certain property was given upon trust for A during his life, or until he should become bankrupt or insolvent or make a general assignment for the benefit of his creditors, or otherwise deprive himself, or be deprived by law, of the beneficial enjoyment thereof, and after the happening of any such event, over.

Held, that the gift over took effect upon A executing a composition deed containing a recital that he was unable to pay his debts in full; and that A could not afterwards dispute the accuracy of the recital. *Billson v. Crofts*. 863

See FELON, 468.
WILL, 622, 864.

LESSEE.

See MINES 114.

LETTER.

See STOCKHOLDERS, 686, 693, note.

LEX LOCI.

1. If a will of the deceased has been formally recognized and acted upon by the court of competent jurisdiction in the country of his domicile at the time of death, and remains unquestioned in that country, the Court of Probate will not allow the validity of such will to be litigated here. *Miller v. James*. 502

2. A testator domiciled in England died possessed of personal estate and also

of real estates in Scotland. His will purported to deal with the Scotch real estates but was inoperative to pass them, and they descended to the Scotch heir. A suit having been instituted for the administration of the testator's estate against the executors, one of whom was the Scotch heir, he elected to take the descended estates in opposition to the will, and gave up the legacy which had been bequeathed to him by the will:

Held, first, that the liability of the Scotch real estates to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of Scotland, and not by the law of the country where the testator's estate was being administered:

3. Secondly, that as the law of Scotland threw the general debts primarily on the personal estate, and did not permit them to fall, directly or indirectly, on the real estate until the personal estate was exhausted, there could be no marshalling in the English Court against the Scotch heir in favor of the pecuniary legatees:

4. Thirdly, that no part of the general costs of the suit could be thrown on the Scotch estates; and that the heir was entitled to his costs out of the personal estate except the extra costs occasioned by his election.

Decision of the master of the rolls reversed.

5. *Semble*, that if the real estate had been situate in England, the costs of the suit, which, under the circumstances, would have been confined to the administration of the personal estate, ought not to have been thrown on the real estate. *Harrison v. Harrison*. 574

6. A, a trader in London, being in difficulties, sent round a letter to his creditors, asking for indulgence; thereupon certain creditors in New York commenced actions in the New York Courts in respect of bills accepted, made payable, and dishonored in London to attach the debts due to A from various New York firms. A immediately filed a petition for liquidation, a receiver was appointed, and application made for an injunction to restrain the actions in the New York Courts:

Held, that the court would not grant an injunction against the foreign creditors suing abroad. *Matter of Chapman*. 724

See WILLS, 535, 538, 540.

LIBEL.

1. A court of inquiry, instituted by the commander-in-chief of the army under the Articles of War to inquire into a complaint made by an officer in the army, though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted and recognized in the Articles of War and the Mutiny Acts; and statements, whether oral or written, made by an officer summoned to attend before such court to give evidence, are absolutely privileged, even though they be made *mala fide*, and with actual malice, and without reasonable and probable cause.

2. Such statements are part of the minutes of the proceedings of the court, which, when reported and delivered to the commander-in-chief, are received and held by him on behalf of the sovereign, and on grounds of public policy cannot be produced in evidence. *Dawkins v. Lord Rokeby*. 212

See CRIMINAL LAW, 486.

LICENSE.

1. Twelve ladies, of whom respondent was one, having purchased materials and made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket, called a missionary basket, from house to house for sale. The ladies did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, and the profits of the sales were devoted to a village school and religious purposes:

Held, that the respondent did not come within the definition of a "pedlar" in s. 3 of the Pedlar's Act, 1871, and was not liable under s. 4 to a penalty for acting as a pedlar without a certificate. *Gregg v. Smith*. 249

LIEN.

See ADMIRALTY, 550, 553.
ASSIGNMENT, 719.

CARRIER, 286.

CREDITORS, 251.

EXECUTORS AND ADMINISTRATORS, 844.

LIGHT.

See Building, 777.

LIMITATIONS, STATUTE OF.

1. The plaintiff, by his bill, stated to the following effect: That an estate being limited to the plaintiff's father for life, remainder to his first and other sons successively in tail, the father in 1797 intermarried with a woman who had been his mistress, and had just borne him a son; that after the marriage the parents agreed to pass off the son as legitimate, and he was always recognized as such; that the plaintiff, who was born ten years afterwards, was the eldest, but was brought up in the belief that he was the second, legitimate son; that when the illegitimate son came of age he was informed by the father that he was illegitimate, and with that knowledge joined the father in suffering a recovery to bar the entail; that on the marriage of the illegitimate son in 1823, he and the father made an antenuptial settlement of the estates, which was negotiated by the wife's father, as her agent, and on her behalf, with full knowledge that the husband was illegitimate; that the father died in 1832, upon which the illegitimate son entered into possession, and remained so till his death in 1842, ever since which time his eldest son had been in possession; that the plaintiff had never until 1866 believed or suspected, or had any reason to believe or suspect, that his elder brother was illegitimate; and the bill prayed for a declaration that the plaintiff was entitled to the estates, and that the defendants, who claimed under the settlement of 1823, might be ordered to give up possession to him. The defendants demurred:

Held, that a Court of Equity had jurisdiction:

2. *Held*, that the designedly bringing up the plaintiff in the belief that he was the second legitimate son was a case of concealed fraud within the meaning of the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 26), and that time did not begin to run against the plaintiff's right to sue in equity until the time when he might first, with reasonable diligence, have discovered the fraud :

3. *Held*, further, that a purchaser for value who, though not having any personal notice of the fraud, contracts through an agent who knows of the fraud, cannot protect himself under the saving in sect. 26 as a "*bona fide* purchaser for value who at the time of the purchase did not know and had no reason to believe that any such fraud had been committed," and that therefore the persons claiming under the settlement of 1828 could not sustain this defense :

4. *Held*, therefore (affirming the decision of *Malins*, V.C.), that the demurrers must be overruled.

5. Whether a defense of purchase for value under sect. 26 can be raised by demurrer, and whether it must not be by plea or answer supported by the defendant's oath, *quare*. *Vane v. Vane*. 607

LOST WILL.

See WILL, 533, *note*.

LUNATIC.

1. The plaintiff and his sister had given a mortgage to M, a solicitor, and the bill was filed against M and the sister to have accounts taken of what was due, and for redemption. The sister was alleged to be of unsound mind, though not found so by inquisition. The plaintiff's solicitor did not serve the bill on the sister, but, by the plaintiff's instructions, assumed to act for her, entered an appearance in her name, and obtained at the rolls the appointment of a guardian *ad litem*. The appearance and the appointment of a guardian were discharged by Wickens, V. C., on evidence that the sister had sufficient capacity to autho-

rize a solicitor to act for her, and that she had authorized M so to act :

Held, on appeal, that whether the capacity of the sister was proved or not, the order of the vice chancellor was right, for that the appearance and the appointment of a guardian founded on it were irregular. *Campa v. Marshall*. 670

See SPECIFIC PERFORMANCE, 850.

M.

MAIL.

1. When contract by, completed. 686, 693, *note*

MAINTENANCE.

See INFANT, 632, 635 *note*.

MANSLAUGHTER.

2. While resisting an officer. 497

MARRIED WOMAN.

1. The property of a married woman, settled by an ante-nuptial settlement for her separate use for life, with remainder as she should by deed or will appoint, with remainder in failure of appointment to her executors or administrators, is an absolute settlement for her sole and separate use, without restraint on anticipation, and vests in equity the entire *corpus* in her for all purposes.

2. A, a widow and the administratrix of her deceased husband (who had died intestate), and entitled to dower as to his real estate, and to a third of his personal estate, being about to contract a second marriage, executed with her intended husband a settlement, whereby she settled the estate she was so possessed of and entitled to, to her sole and separate use, with power of appointment by deed or will

and with his consent gave a letter instructing her bankers to keep separate accounts, and to consider any private overdraft by her on her own account secured by the administrative deposits in their hands. At this time two sums of £6,000 and £8,000 were in deposit on such account, and subsequently various other sums were, from time to time, paid in by her to the same account, and placed at interest with the bank, who allowed her to overdraw her private account on the strength of the arrangement so made.

By her will she executed the power of appointment reserved to her by the settlement, and having at the time of her death overdrawn her private account to a considerable amount, the bankers claimed, as against the parties interested under the will, to retain the sums so paid into their hands, on account of the administrative account, and especially the sums of £6,000 and £8,000, so deposited with them, in payment of the sums due to them on account of the overdrafts made by her on her private account, and brought a suit in the Supreme Court of the Colony of Victoria to enforce such lien. The Supreme Court dismissed the suit:

Held by the judicial committee, reversing such decision, that, whether or not the bankers had notice of the settlement (which fact was uncertain) the letter of instruction to them by A, was a valid execution of the right reserved by her, as regarded the two sums of £6,000 and £8,000 then in their hands, and in the absence of fraud gave the bankers a lien on those sums for any future overdraft that might be made in accordance with the terms of such letter.

8. The *dictum* of Lord Justice Turner in the case of *Johnson v. Gallagher*, as to the liability of the separate estate of a married woman for debts contracted with reference to such estate, approved and adopted. The case of *Shattock v. Shattock* dissented from. *London Chartered Bank of Australia v. Lamprière*. 137, 159, note.

MARSHALLING ASSETS.

See LEX LOCI, 577.

MINES.

1. When the thing let turns out to be a nonentity, the lessee is not bound.

Per THE LORD CHANCELLOR: In such a case it is perfectly reasonable that the lease should be subject to reduction.

Per LORD CHELMSFORD: Where there is a total destruction or exhaustion of the subject matter of a lease, the lessee is entitled to abandon it.

2. *Per* THE LORD CHANCELLOR: The lessee of a mine, although entitled to rely on the existence of the subject matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted.

3. At common law, the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely.

4. *Per* LORD CAIRNS: What we term a mineral lease is really a sale out and out of a portion of the land. *Dicta* therefore applicable to agricultural leases are not always applicable to leases of minerals. *Gowan v. Christie*. 114

5. A feu of land was granted reserving the subjacent minerals, and stipulating that the feuar should have no claim against the superior or his tenants in respect of any damage that might arise from the working of the minerals. Damage having arisen, the feuar obtained from the Court of Session an interdict prohibiting the mineral workings complained of; but the house of lords revoked the interdict — holding that the feuar had made a contract which bound him to submit to its consequences.

Per THE LORD CHANCELLOR: This interdict imposes on the superior an obligation which it was the express object of the contract to relieve him from. The fact that the contract was improvident cannot alter the construction of a special stipulation.

Per LORD CHELMSFORD: It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning. *Buchanan v. Andrew*. 135

6. A conveyance of land in fee was made subject to a reservation to the grantors of mines and minerals, and extensive powers of occupying and using the surface for the purpose of working the same. It was provided thereby that it should not be lawful for the grantee to do or suffer anything to be done whereby the grantor should be prevented, hindered, or obstructed in the exercise of the powers reserved, and also that the grantors should make to the grantee annually reasonable compensation for damage or spoil of ground to be occasioned by the exercise of the reserved powers. Previously to the date of the deed of conveyance the premises were leased to the grantee, subject to similar reservations to those in the conveyance, and workings already existed which had taken place under such reservations.

Held, that no restriction was placed by the words of the conveyance on the use by the grantee of the land for any purpose to which it was applicable so long as he did not touch or interfere with the minerals, and the compensation for damage or spoil of ground occasioned by the exercise of the powers reserved must be estimated with reference to the value of the land for any purpose to which an ordinary owner might put it; and that compensation was due in respect of damage arising from the use subsequently to the conveyance of land included therein that had been previously occupied and used for mining purposes, but not in respect of the mere existence of workings in being at the time of the deed, or their subsequent user without any fresh damage. *Mordue v Dean and Chapter of Durham*. 311

MISTAKE.

See REFORMATION OF CONTRACTS, 834.
SETTLEMENT, 645.
SPECIFIC PERFORMANCE, 847.
WILL, 508.

MONOPOLY.

See GAS COMPANY, 784.
5 ENG. REP.]

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MORTGAGE.

See ADMIRALTY, 550.
FIXTURES, 241, 246, *note*.

MUNICIPAL CORPORATION.

See COMPENSATION, 887, 892, *note*.

MURDER.

1. While resisting an officer. 497
See CRIMINAL LAW, 471.
EVIDENCE, 479.

N.

NE EXEAT

1. Upon evidence that a defendant, who has been ordered by decree in an administration suit to pay into court on or before a certain day the balance admitted by his answer to be due from him to the estate, is about to leave the country, a writ of *ne exeat* may be obtained against him by his co-defendants, the executors, although the day to which the time for payment was extended has not arrived. *Sobey v. Sobey*. 805

NEGLIGENCE.

1. In an action against the defendants for negligence it was proved that the plaintiff, being a passenger on defendants' railway, got up from his seat and put his hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the next station, and that the pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evidence as to the condition of the door and its fastenings. The jury having found for the plaintiff, leave being reserved to enter a nonsuit on the ground that there was no evidence of the defendant's liability:

Held, by the Queen's Bench and Exchequer Chamber, that there was evidence, and that the verdict ought to stand.

2. *Quare*, how far the question of contributory negligence is open in such cases. *Gee v. Metropolitan Railway Co.* 169

3. The plaintiff desired to send a cow from D. to S., and took her to the station at D., belonging to the G. N. Co., where he booked her for S. by the defendants' railway. He signed a contract, under which it was agreed between him and the G. N. Co. that they should not be responsible for any loss or injury to cattle, in the delivering, if such damage should be occasioned by kicking, plunging, or restiveness. The cow was put into a truck belonging to the defendants, and on arriving at S. was brought to a siding by the defendants' yard for the purpose of being unloaded. A porter in charge of the yard began to unfasten the truck. The plaintiff thereupon warned him not to let the cow out, as she would run at him; nevertheless he did let her out; she ran about the yard, and ultimately got on to the line and was killed. By an agreement between the defendants and the G. N. Co. it was provided that a complete and full system of interchange of traffic in passengers, goods, parcels, etc., should be established from all parts of one company and beyond its limits to all parts of the other company and beyond its limits, with through tickets, through rates, and invoices and interchange of stock at junctions; the stock of the two companies being treated as one stock. . . That the two companies should aid and assist each other in every possible way, as if the whole concerns of both companies were amalgamated. In an action brought against the defendants for the loss of the cow, the court having power to draw inferences:

Held, first: That the action was rightly brought, inasmuch as the agreement, if it did not constitute a partnership between the two companies, showed that the G. N. Co. became the agents of the defendants to make the contract for the carriage of the cow.

4. Secondly: That the condition in the contract did not relieve the defendants from liability for negligence on the

part of their servants in delivering the cow.

5. Thirdly (by Blackburn and Lush, J.J.; Mellor, J., dissenting): That the inference to be drawn from the facts was that there was negligence on the part of the defendants' porter; and that they were, therefore liable to the plaintiff for the loss of the cow. *Gill v. Manchester, etc. Railway Co.* 187

6. The N. Company had statutory authority to run over a portion of the defendants' line, paying a certain toll to the defendants. The signals at the point of junction between the two lines were under the control of the defendants. Owing to the servants of the N. Company negligently disobeying these signals, a train of the N. Company ran into a train of the defendants' servants. In an action for injuries sustained, brought by the plaintiff against the defendants:

Held, that he was not entitled to recover. *Wright v. Midland Railway Co.* 332, 342, *note*

NEPHEWS.

See WORDS.

NEW TRIAL.

See COSTS, 234.

NIECES.

See WORDS.

NON-RESIDENT.

See BANKRUPT, 600.
LEX LOCI.

NOTICE.

See BONA FIDE.
BUILDING, 777.
CARRIER, 286, 298, *note*.
FIXTURES, 241, 246, *note*.
GUARANTY, 860.
INSURANCE, MARINE, 40.
MARRIED WOMAN, 187.

O.

OBSTRUCTION.

See BUILDING, 777.

OFFICER.

1. Killing of, while resisting. 497

P.

PARENT AND CHILD.

See INFANT, 632, 635, *note*.

PARTIES.

See FRAUD, 202.

PATENT.

1. A patentee of improvements in brick-cutting machines, who was a manufacturer of the machines by an agent at the agents' works and not a licenser, having obtained a perpetual injunction against defendants, who were also manufacturers of brick-cutting machines, from infringement, the defendants were ordered to file an affidavit stating the number of machines made by them since the date of the patent, and the names and addresses of the persons to whom the same had been sold, and of the agents concerned in the transactions. Upon motion to vary the order;

Held, that the plaintiff was entitled to have discovery of the names and addresses of the purchasers; but not of the agents concerned, there being nothing to show that any agents had been employed. . *Murray v. Clayton*. 750

PARTITION.

1. Where infant plaintiffs prayed for a declaration that premises were divisible amongst them and a defendant, and that the costs of the suit might be taxed, and the plaintiffs' costs declared to be a charge on their shares; for a partition, or sale, and, after payment of the costs, for a division of the proceeds, the court made a declaration as to the rights of the parties, and directed a sale, but declined to make any order as to the costs until the further consideration of the cause. *Davey v. Wietlisbach*. 843

PARTNERSHIP

1. H, a partner in a banking firm, entered into a bond with a board of guardians, on being appointed their treasurer, with two sureties, one of whom was K, a partner in the firm, and the other was E, who was not a partner. H kept the account of the guardians' money at his bank under a special heading, "Norwich Union," and a sum of £5,677 was standing to that account when the bank stopped payment. H died shortly after the stoppage, and his estate was administered in Chancery. The other partners were adjudicated bankrupts. The joint estate and H's separate estate were alleged to be insolvent; joint debts, to a large extent remained unpaid; K's separate estate was solvent. The amount due to the guardians was paid by E, who recovered by proof upon the separate estate of K, his co-surety, one moiety of the amount paid. The trustee of K's separate estate, who was also the trustee of the estate of the bankrupt partners, then claimed to prove against H's separate estate for the amount of the moiety paid to E out of K's estate:

Held, that, as the partnership received the money from and owed to it the guardians, the relation of principal and surety never in reality existed be-

tween H and K. The claim was therefore disallowed.

2. Order of the master of the rolls affirmed.

3. Whether *Ex parte Topping* would apply to a case where the separate estate in respect of which the proof is sought to be made is solvent, so that any surplus would go to the joint estate, *Quære. Lacey v. Hill.* 654

4. A testator, a nurseryman, devised his real estate, on part of which he had carried on his business, and his residuary personal estate, to his three sons, F, M, and J, as tenants in common. After his death they carried on the business in partnership, and out of moneys belonging to the estate completed a contract for the purchase of more land which was inchoate at the death, and employed such land in the business. Subsequently, F, and J, purchased M's third share in the land and business, and paid for it partly out of the estate and partly out of moneys borrowed on the land. F and J then continued the business on the land. F subsequently died intestate:

Held, that both the devised and the purchased land employed in the business was converted. *Waterer v. Waterer.* 901

See COPYRIGHT, 743.

EXECUTORS AND ADMINISTRATORS, 765.

NEGLIGENCE, 187.

SET OFF, 786.

PAYMENT.

1. To one trustee when not a discharge of the creditor. *Lee v. Sankey.* 808

See STOCKHOLDERS, 626.

PEDLAR.

See LICENSE, 249.

PENALTY.

See DAMAGES, 701.
LICENSE, 249.

PERFORMANCE.

See VENDOR AND PURCHASER, 363.

PERSONAL ESTATE.

1. Power to convert real into personal estate. 636

PILOTAGE.

See ADMIRALTY, 565.

PLEADING.

See ADMIRALTY, 569.

ALTERATION, 361.

DEMURRER, 607.

FRAUD, 187.

FRAUDS, STATUTE OF, 581.

LIMITATIONS, STATUTE OF, 607.

POWER.

1. Husband and wife, having, under their marriage settlement, a joint power of appointment over personalty in favor of the children of the marriage, of whom there were three survivors, appointed one-third of the fund to trustees upon such trusts as H (one of the sons) by deed, executed with the consent of the father during his life, and after his death with the consent of the trustees of his will, or by will, should appoint; and in default of such appointment, upon trust for H for life, or until bankruptcy or assignment such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent; and after H's death, upon trust for his executors or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned:

Held, that the appointment to such uses as H should appoint, with consent of the trustees, was void, but that the limitation over in default of appointment by H was valid, and gave H an absolute interest in the share, subject to the contingency of his committing a forfeiture within the prescribed period.

2. Husband and wife had a joint power of appointment over real estate among the children of the marriage for such estates and interests, and in such manner as they should think fit. In default of and subject to such appointment the estate was to be held, subject to the parents' life interest, in trust for all the children to whom no share had been appointed, to vest in them at twenty-one or marriage. The settlement contained a power of sale and exchange, but no trust for absolute sale.

The husband and wife appointed two-fourths to H and another of their children, the appointment to H being in the same terms as that of the personality, and declared that the shares of any person interested in the capital arising from any sale under the settlement should be of the quality of personal estate:

Held, that the appointers had power to convert the real into personal estate, and that H took an absolute interest in his share subject to the same contingency as in the case of the personality. *Webb v. Sadler*. 636

See MARRIED WOMAN, 187.
WILL, 857.

PRACTICE.

1. Court will not hear fictitious case, 730, 735, *note*.
2. As to compelling attorney to disclose residence of client. 836, 838, *note*.

See LUNATIC, 670.
SERVICE, 842.

PRESCRIPTION.

1. The defendant was the occupier of a close adjoining a close occupied by the plaintiff. The defendant's close was woodland, and he sold the fallage of the timber to H, continuing himself to occupy the close. H felled a tree in a negligent manner, so that it fell over the fence between the two closes, and made a gap in it. Two cows of the plaintiff soon afterwards got from the plaintiff's close through the gap into the defendant's close, and fed on the leaves of a yew tree which had been felled there by H, and died in consequence. The defendant had had no notice of the fence having

been broken down before the escape of the plaintiff's cows. There was evidence that the defendant and his predecessors had for more than forty years repaired the fence (which was on his land) between the two closes whenever repairs were necessary; and that for the last nineteen years the fence had been repaired by the defendant and his predecessors upon notice by the occupier for the time being of the plaintiff's close. Whenever the fence was so repaired it was for the purpose of preventing cattle on the plaintiff's close from escaping into the defendant's close:

Held, that the evidence showed a prescriptive obligation on the part of the defendant to maintain the fence so as to keep in the cattle in the plaintiff's close; that the obligation was absolute to keep up a sufficient fence at all times, the act of God or *vis major* only excepted, without any notice of want of repair; that the damage was not too remote; and the defendant was therefore liable to the plaintiff for the loss of the cows. *Lawrence v. Jenkins*. 228, 233, *note*.

PRINCIPAL AND AGENT.

1. If the agent have notice of facts rendering a purchase invalid the principal is chargeable with such notice. *Vane v. Vane*. 607

See DIRECTORS, 830.
FRAUD, 202.
SERVICE, 842.

PRINCIPAL AND SURETY.

See GUARANTY, 860.
PARTNERSHIP, 654.

PRISON BREACH.

See CRIMINAL LAW 469.

PRIVILEGED COMMUNICATION.

See LIBEL, 212.

PROBATE.

See WILL.

R.

RAILWAY COMPANY.

1. Liability of companies where two companies used same track, and only one guilty of negligence. *Wright v. Midland Railway Co.* 332, 342, note

2. Is its rolling stock fixtures? 241, 246, note

See COMPENSATION, 256, 277, note.
NEGLIGENCE, 169, 187.

REAL ESTATE.

1. Power to convert unto personality. 636
See PARTNERSHIP, 901.

RECORD.

See FIXTURES, 241, 246, note.
FRAUDULENT CONVEYANCES, 816.

REFORMATION OF CONTRACTS.

1. A deed was executed purporting (by mistake) to convey a moiety only of real estate, the intention of the parties having been to pass the whole. Infants were interested. Upon bill for rectification:

Held, that a conveyance of the other moiety by another deed was not necessary, and order made declaring that the deed was, in the particulars after specified, executed by mistake, that it was intended to pass the entirety, and that the deed ought to be rectified, ordering rectification by words and figures accordingly, and directing a copy of the order to be endorsed on the deed. *White v. White.* 834

See MISTAKE.
WILL, 506.

REMOTE DAMAGES.

See AUCTIONER, 238.
PRESCRIPTION, 228, 233, note.

RENT.

See WATER TAX, 331.

RES ADJUDICATA.

See FORMER SUIT, 286, 298, note.
LEX LOCI, 502.

RESCISSION.

See BANKRUPTCY, 323.
FRAUDS, STATUTE OF, 581.
INFANT, 838.
INSURANCE, MARINE, 339.

RESERVATION.

See MINES, 125, 311.

RESIDENCE.

See DOMICIL, 673.

REVOCATION.

See WILL, 530, 532, note.

S.

SALVAGE.

See ADMIRALTY, 565, 569.

SCRIVENER.

See WILL, 508.

SERVICE.

1. The defendants were a Scotch corporation, with running powers over an English railway to Carlisle, and their only officer in England was a

booking clerk at a station at Carlisle, whose sole duty was to issue tickets to travelers. The station at Carlisle was wholly under the control of the English company, but the defendants had use of it at a rental payable to that company. The defendants' head office was in Scotland:

Held, that the booking clerk was not a head officer or clerk of the defendants, who could be properly served with a writ issued against the defendants. *Mackereth v. The Glasgow, etc., Railway.* 342

SET OFF.

1. Under the Bankruptcy Act, 1869, the right of set-off is extended to unliquidated damages.

2. Where a person from whom rent is due to an estate in course of administration under the Bankruptcy Act, 1869, has a claim against the estate, he may set off his claim against all rent due down to the close of the bankruptcy. *Booth v. Hutchinson.* 697

3. The plaintiff Bank sold acceptances of theirs to C & Co. partly in consideration of acceptances of C & Co. The firm of C & Co. consisted of two partners, both of whom in 1866 executed assignments for the benefit of their separate creditors, one of which assignments was registered under the Bankruptcy Act of 1861, but the other was not; and the partnership affairs were afterwards wound up in a chancery suit. At the time, when these assignments were executed the acceptances of C & Co. were not due and were in the hands of third parties, who afterwards re-assigned them to the plaintiff Bank, in order that the plaintiff Bank might establish a set off against C & Co.; and it was agreed that any moneys recovered by means of the set off should be divided between the plaintiff Bank and the holders of the acceptances in certain proportions:

Held, that as there was no bankruptcy of the firm of C & Co., the plaintiff Bank were not entitled to set off the acceptances of C & Co. against the acceptances of the plaintiff Bank.

4. *Semble*, that the plaintiff Bank were only in the position of trustees of the acceptances of C & Co., and on that

ground also were debarred from claiming a set off. *London, etc. v. Narraway.* 736

SETTLEMENT.

1. The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluntary settlement invalid; they are merely circumstances to be considered in deciding on the validity of a voluntary settlement.

2. A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death, for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to contain a power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the consent of a son who was both beneficially interested and a trustee of the settlement, and made a will purporting to dispose of the whole property:

Held (reversing the decree of Wickens, V. C.), that, under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions. *Hall v. Hall.* 645

3. After proposals of marriage had been accepted, the lady's father wrote to the intended husband as follows: "V being my only child, of course she will come into the possession of what belongs to me at my decease." In a subsequent letter, addressed to the mother of the intended husband, the father, after declining then to extract £4000 from his business, and stating that some years since he had made a will leaving "all my property" in trust for his daughter for life, for her separate use, and the principal to be divided as she by her will might ultimately dispose of, he said, "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts of the case,

and of course I should settle my property (subject to my sister's annuity) on my daughter, absolutely and independent of her husband; or, in other words, in strict settlement." He further "agreed" to allow his daughter and her husband £100 a year during his life; and added, "I will take care that my property (which, I suspect, will exceed £4000) shall be properly secured upon her and her children after my death." The marriage having taken place, the father, who was then a widower, afterwards married again, and made a will whereby he devised and bequeathed parts of his property to his wife, and gave several life annuities.

Upon bill by the daughter, claiming to have all the property of which the testator died seized or possessed settle: upon her in strict settlement:

Held, that the above expression of intention on the part of the testator amounted to a contract to settle the whole of the property of which he should die seized or possessed upon the plaintiff in strict settlement. *Coverdale v. Eastwood*. 755

See HUSBAND AND WIFE, 571.
MARRIED WOMAN, 137.

SHIPPING.

See ADMIRALTY, 550.

SICKNESS.

See BENEVOLENT SOCIETY, 246.

SLANDER.

See LIBEL.

SPECIFIC PERFORMANCE.

- 1 On a petition presented under the Leases and Sales of Settled Estates Act, an order was made for the sale of an estate to which A B, a person of unsound mind, but not found by inquisition, was entitled for life in remainder. A B's brother had been previously appointed, under the 38th section of the act, the guardian of A

B and of certain infants for the purpose of consenting on their behalfs to the application, and he was to be at liberty on behalf of the infants to consent. The order for the sale was made upon hearing counsel for A B by his guardian, and the guardian by his counsel consenting.

The purchaser objected to the title on the ground that only a committee properly appointed could consent on behalf of A B:

Held, that the objection was well founded; and a summons taken out by the vendors to compel the payment of the balance of the purchase money, interest, and the costs, dismissed. *Matter of Clough's Estate*. 850

2. Where decision of the court removes the doubt as to title, specific performance will be enforced. *Bell v. Holby*. 792

3. After a decree for specific performance of a contract to take a lease of a house, and an order on further consideration for payment of the sums certified to be due from him (for costs and damages), defendant having absconded without paying the amount, the court, on motion by plaintiff, ordered the contract to be rescinded and all further proceedings in the suit stayed, except as to the recovery of the sums already ordered to be paid. *Watson v. Cox*. 816

4. At a sale of an estate by auction under the direction of the court, J. E, having previously been informed of the value of the timber, purchased lot 2, and agreed to take the timber at the price named by the auctioneer. The chief clerk confirmed the sale and filed his certificate. It was subsequently discovered that the value of the timber on a portion of the lot had been, by the mistake of the auctioneer, omitted:

Held, on summons by the vendors, that the purchaser was entitled to hold the property without submitting to a valuation of the timber. *Griffiths v. Jones*. 847

See FRAUDS, STATUTE OF, 581
WILL, 864.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STOCKHOLDERS.

1. A joint stock company was registered under the 7 & 8 Vict. c. 110. Certain clauses in its deed of settlement required that a holder of shares desirous of transferring them must give notice thereof to the officer of the company; that the directors at a board meeting must certify their approval of the proposed transferee; that the transferor must execute a deed of transfer; and that every transferee, approved of by the directors, must, within one calendar month execute, at the office of the company, or at such other place as the board should reasonably require, a deed of covenant to abide by the rules and regulations of the company, "whereupon such person shall become a shareholder of the company." B held shares in the company, and was a director; he desired to transfer his shares; he gave no notice—no certificate of approval was given before the transfer (it was alleged that such certificate was given after the transfer); a deed of transfer was executed, but no deed of covenant as required by the articles of the association was ever executed:

Held (diss. LORD CHELMSFORD, and LORD COLONSAY), that the transfer thus made, though irregularly, was not invalidly made, and the persons then known as directors having at a meeting of shareholders recognized the transferees as shareholders, and having then and there declared them to be elected as directors, and the shareholders at such meeting having accepted them as directors, the validity of the transfer to them and their title to office could not afterwards be impeached:

Per LORD CAIRNS: The clauses in the deed are affirmative clauses—the objection as to the non-execution by the transferee of the deed of covenant is cured by the 30th section of the 7 & 8 Vict. c. 110. The moment the transferee assumed to act as a director, and allowed himself to be returned as a shareholder, he lost all right to question his liability.

Per LORD CHELMSFORD: A transferee of shares may be estopped from disputing his liability as a shareholder, and yet his ownership of the shares may not qualify him for holding office in the company. The 30th section of 7 & 8 Vict. c. 110, does not apply to this case:

2. *Held, also (diss. LORD CHELMSFORD and LORD COLONSAY)*, that the transfer made under these circumstances was sufficient to relieve the transferor from liability to become a contributory:

The directors had no power to dispense with the execution, by the transferee of the deed of covenant—the only discretion they possessed as to such deed related to the place of its execution.

By one clause of the deed of settlement it was provided that if losses should absorb not only the reserve fund, but also 80 per cent of the capital subscribed for, "the company shall be *ipso facto* dissolved, and the directors shall within twenty days (and they are hereby required so to do) call a special general meeting of the shareholders, and lay a statement of the affairs of the company before such meeting." A report of an accountant specially employed by the directors showed that such losses had occurred. No special meeting was called, nor at the next general meeting (which occurred shortly after the date of the report) was the report laid before the shareholders, but the business of the company was continued. At the general meeting of that year the report was not laid before the shareholders, but they were informed that the increased claims upon the company had so reduced the margin of profit that the directors could not recommend the payment of a dividend. At the next general meeting the shareholders were told that three new directors had been elected, but they were not told that three of the old directors had retired, and that their transferred shares constituted the qualification upon which the new directors had been elected:

3. *Held (diss. LORD CHELMSFORD and LORD COLONSAY)*, that these circumstances, though entirely irregular, did not invalidate the proceedings of the directors.

Per LORD CAIRNS: The allegations of facts in this case were not those which should have formed the ground for a proceeding to settle contributories; if true they constituted a case for relief of a wholly different description. The case showed the great advantage of the use of some form of pleading.

4. In the court of the master of the rolls the transfer had been held to be invalid, and the transferor liable to be made a contributory. By Lord Chancellor Hatherly this decision had been reversed. In this house the judgment of the lord chancellor was sustained; but, on account of the differences of opinion, and the irregularities of the proceedings in the transfer (though no fraud was established), no costs were given. *Murray v. Bush*. 1

5. Any *bonâ fide* transactions between a company and a shareholder which, if the company brought an action against him for calls, would support a plea of payment, is "payment in cash" within sect. 25 of the Companies Act, 1867.

S took shares in a company formed for working a mine which he sold to them. The whole nominal amount of the shares was immediately payable, as was also the purchase-money of the property. It was agreed between S and the company, that he should be credited in account with the price of the property, and debited with the amount payable on his shares; and the balance of the account thus made out was shortly afterwards exactly balanced by cash payments by S:

Held (reversing the decision of the vice warden of the Stannaries), that S must be considered as having paid up his calls in cash. *Spargo's Case*. 626

6. The deed of settlement of a life insurance company provided that any shareholder should be at liberty to transfer his shares to any other person who was already a shareholder, or who should be approved by the board of directors, and that no person not being already a shareholder, or the executor, etc., of a shareholder, should be entitled to become the transferee of any share unless approved of by the board:

Held (reversing the decision of the master of the rolls), that the directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the board; and that, in the absence of evidence to the contrary, the court would take for granted that they acted reasonably and *bonâ fide*. But if there is evidence to show that directors who have such

a power have exercised it capriciously or unfairly, the court has jurisdiction to interfere, and this jurisdiction may be exercised on a summons under the 35th section of the Companies Act, 1862. *Matter of Gresham Life Assurance Co*. 655

7. An applicant for shares in a company denied that he had received the letter of allotment, which was posted in London on the 16th of March, and should have arrived on the 17th; and, having written on the 17th recalling his application, applied to have his name removed from the list of contributories:

Held, that the unsupported evidence of the applicant was not sufficient to prove that the letter of allotment which was posted had not been received, and that the name must therefore be retained upon the list. The court expressed an opinion that if the letter of allotment had not been received, the contract to take shares would still have been binding upon the applicant as soon as the letter was posted. *Wall's Case*. 686, 693, note

8. A signed an application for shares in a company upon condition that he should be appointed secretary, and his acceptance of the office was to be subject to further inquiries, which he had caused to be made respecting the position of the company. The shares were allotted the next day, but A, in consequence of information he received, declined the appointment, and required that the allotment should be cancelled. The company was wound up voluntarily, and A's name was placed on the list of contributories:

Held, that the application for shares was conditional, and the condition not having been fulfilled, A's name must be removed from the register and list of contributories, and as he had been placed there without any justification, he must receive costs as between solicitor and client by way of damages, under sect. 35 of the Companies Act, 1862, for the extra expenses incurred by him. *Wood's Case*. 827

9. Plaintiff, a registered owner of fifteen shares in a limited company, sold them through his broker on the London Stock Exchange, and 180 shares in the same company, which included the above fifteen, were bought by a broker on the Exchange, as agent for a firm of brokers in Scotland. The

purchase money was paid, and the name of W. K. of Aberdeen, described as an "Esq.," was furnished as that of the purchaser. A transfer deed of fifteen shares from the plaintiff to W. K. was executed by both parties, and registered, W. K.'s name remaining on the register till the winding up, when it was found that he was a clerk in the employ of the Scotch firm of brokers, and an infant. The name of the plaintiff having been restored to the register, and settled on the list of contributories, as the owner of fifteen shares, and calls having been made, he filed a bill against the Scotch brokers, who, by their answer, disclosed the names of four persons, their principals, D, E, J and S, as the purchasers of thirty, forty, thirty and thirty shares respectively in the company, which, however (except as to E's forty, which did not include the plaintiff's fifteen), had not been appropriated.

Upon bill by amendment against the brokers and D, J, and S, praying for a declaration that the fifteen shares were held by the plaintiff as a trustee for D, J and S, and for release of indemnity.

Held, that the plaintiff was a trustee of the fifteen shares for the defendants D, J and S, and release and indemnity of the plaintiff by the defendants ordered as prayed. *Brown v. Black.*
877

10. W. D. one of the seven persons who subscribed the memorandum of association of a company, to work a certain concession, agreed to take 100 shares. A recital of the articles of association was that E who assigned the concession to the company, had agreed to cause to be allotted to the persons subscribing the articles, shares to be deemed fully paid up, and the fifth article stated that the shares of each subscriber of the memorandum should be allotted to him as fully paid up, and that a competent number of shares should be allotted to E in pursuance of the arrangement which had been previously come to. The company was registered on the 22d of September, 1865, and on that day the directors issued to E, for work already done, &c., &c., £50,000 in debentures and 4000 shares. W. D was a director.

On the 3d of October, 1865, E requested the secretary to place shares of the 4000 in the names of the per-

sons mentioned, W D being one of them, for 100 shares. The company was afterwards ordered to be wound up. The official liquidator placed the name of W. D on the list of contributories in respect of the 100 shares for which he subscribed, and on summons asking that a call of £3 a share might be made:

Held, that W. D's name had been rightly placed on the list, and that he must pay the call, and that it was not competent to persons who had bound themselves by the memorandum to take and pay for shares, to introduce an article into the articles of association to the effect that they should not be called upon to pay anything. *Dent's Case.* 905

See DIRECTORS, 304.

SURETY.

See CARRIER, 286, 298, *note*.

SURVIVORS.

See EXECUTORS AND ADMINISTRATORS, 765

T.

TAILESTATES.

See WILL, 792.

TAX.

See WATER TAX, 381.

TENDER.

See VENDOR AND PURCHASER, 363.

TITLE.

See ASSIGNMENT, 719.

TORT.

See CARRIER, 319.

TRESPASSER.

See DAMAGES, 707.

TRUSTS AND TRUSTEES.

1. A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate, which had been taken by a railway company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid:

Held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust estate from such improper payment. *See v. Sankey.* 808

See DIRECTORS, 304.
WILL, 746, 864.

V.

VARIANCE.

See CRIMINAL LAW, 392, 471.
FRAUD, 137.

VENDOR AND PURCHASER.

1. The defendant (with A, since deceased) sold a farm to the plaintiff under conditions of sale; by the 8d condition it was stipulated that the vendors should deliver an abstract of title within seven days, and "all objections and requisitions not stated in writing and delivered to the vendors' solicitor within fourteen days from delivery of the abstract shall be con-

sidered as waived, and in this respect time shall be of the essence of the contract;" and by the 14th condition, "if the purchaser shall fail to comply with these conditions, his or her deposit shall be thereupon actually forfeited to the vendors," who were to be at liberty to resell, and recover any deficiency and the cost of resale from the purchaser. The plaintiff paid a deposit of 300*l*. An abstract of title was delivered within seven days; and from the abstract it appeared that the vendors sold as trustees under a will which devised the estate to them on trust to pay the income to F. S, the testator's son-in-law, for life, or to permit him to receive the same, and, after his decease, on trust to sell the estate and hold the produce "upon the trusts for the children of the said F. S, as therein mentioned;" it was further stated in the abstract that F. S. would join in conveying the property.

It was objected by the purchaser, but not till after the expiration of fourteen days from the delivery of the abstract, that F. S. being still alive, the vendors' power of sale had not arisen.

It subsequently appeared that the trusts of the will as to the produce of the sale were for the benefit of such of the children of F. S, by H. S, the testator's daughter, who should be living at testator's death, to be paid to them at twenty-one, or, if daughters, at twenty-one or on marriage, with limitations over for the benefit of survivors on the death of any child, under twenty-one or before marriage. There were eight children of F. S. and H. S. living at the testator's death, of whom some had since married and settled their shares.

In an action brought by the purchaser to recover his deposit:

Held, that he was entitled to succeed (by Kelly, C. B.), on the ground that no complete abstract had been delivered, and that therefore the time limited for taking objections had never commenced running; (by Martin and Pollock, BB.) on the ground that the 14th condition did not apply to the case of the vendors being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title. *Want v. Stallibrass.* 363

See SPECIFIC PERFORMANCE.

W.

WAIVER.

See BUILDING, 777.

WARRANTY.

See INSURANCE, MARINE, 278.

WATER TAX.

1. By their local act (16 Vict. c. xxii), s. 79, the plaintiffs were bound to supply the houses within a certain district with water "at the following rate per annum, that is to say, where the rent of such dwelling-house" should not amount to 7*l.* per annum, at a rate not exceeding six per cent per annum on such rent, but not exceeding 7*s.* 2*d.* per annum; and so on in a graduated scale.

The defendant was owner of numerous small houses supplied with water by the plaintiffs, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district-rate:

Held (affirming the judgment of the court below), that "rent" in s. 79 was equivalent to "annual value;" and that, in estimating the rents on which the water rate was payable, the defendant was entitled to deduct the rates so paid by him. *Sheffield water-works v. Bennett.* 381

WILL.

The deceased executed a will in 1866, and a codicil to it in May, 1871. In November, 1871, he executed a will which revoked all previous testamentary papers. In 1872 he executed a paper which was headed, "This is a codicil to the will of R, dated May, 1866." It concluded with the appointment of the son as executor of the will and codicil, and the attestation clause commenced, "Codicil to the will of R, dated May, 1866, in presence of," etc.:

Held, that the only intention to be gathered from the words of the codicil was that the testator intended to revive the will of 1866, but not the

codicil of May, 1871. *In re goods of Reynolds.* 528

2. A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F. successively in tail male; and for default of such issue to R., the second son of his son, for life, with remainder to the first and other sons of R. successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born, successively in tail male; and for default of such issue to his daughter I., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter E., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter I., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S., for life, with remainder to her first and other sons, successively in tail male; and for default of such issue, to all and every the fourth and fifth, and other daughter or daughters of his son successively, and in remainder one after another, and to the heirs male of their bodies; and for default of such issue, "to the use and behoof of all and every other the issue of my body," and for default of such issue to his right heirs. The will also contained a wish that the estates should be retained in the hands of one person and should not be dispersed, and a provision that any female who inherited, should, with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A muniment box was directed to go to the person entitled from time to time to the estates:

Held (affirming the judgment of the court below), that there was, by virtue of the penultimate limitation, a vested remainder at the death of the testator in tail general, to which his son then became entitled.

3. This remainder descended to F., who duly executed a disentailing deed. He devised the estates to the defendant's father, from whom it descended to the defendant. In actions of ejectment (a) by persons claiming as issue of the body of the testator as joint tenants *per capita*, at

the time the estates vested in possession, (b) by the heiress in tail general of the testator at the same period, and (c) by the heir in tail of the testator at his death, those being excluded who came within the particular limitations :

Held (affirming the judgment of the court below), that the defendant was entitled to judgment. *Algood v. Blake*. 352

4. The evidence of one attesting witness (the other being dead) proved that he was called into the room of the deceased, and asked by a third party, who had the will in his hand at the time, to witness the signature of the deceased. A mark or cross was then on the paper at the foot of the will. The witnesses signed their names. The deceased was present, and within hearing, but did not make any observation, and the will was not read to or by him in the presence of the witnesses. The writer of the will, who had asked the witnesses to sign their names, was not called, and no proof was offered of his death :

Held, that the evidence failed to prove that the deceased acknowledged his signature in the presence of witnesses. *Morritt v. Douglas*.

500, 502, note.

5. A will of the deceased having been found in which A was named executor, he gave notice thereof to B, who was about to obtain a grant in the goods of the deceased as interested under a previous will, and entered a caveat. Before the caveat had been warned, and therefore before contentious proceedings had originated therefrom, he withdrew it, and signified to B that he did not intend to seek to establish his will, and administration, with the earlier will annexed, issued to B. Subsequently A took out a citation calling upon B to bring in the administration and show cause why it should not be revoked :

Held, that A was not precluded from continuing a suit to determine which was the last will of the deceased. *Goddard v. Smith*. 504

6. Testator gave oral instructions for a will to his attorney, who made a memorandum of them in his presence. The residuary clause was as follows : " And the residue equally amongst all the sons, including the eldest son for the time being, on attaining twenty-

one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms, " the trustees to stand possessed of all the residue and remainder of my real estate in trust to divide the same, etc." The draft will was left with the testator, and on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause above given. The will with such words was executed by the testator :

Held, that, however clearly an error can be established, in a will unless words have been inserted by fraud or by mistake without the knowledge of the testator, the Court of Probate cannot correct it either by the omission of words or by the insertion of other words. *Harter v. Harter*. 508

7. The court allowed costs out of the estate to the unsuccessful opponent of a will although he had pleaded undue influence and fraud, being of opinion that the mode in which the testator had executed the will and the conduct of the persons beneficially interested under it had reasonably excited doubt and suspicion, and justified those pleas. *Orton v. Smith*. 518

8. The deceased executed a will and codicil, the latter referring to the former by its date. The name of the executor appointed by the will was written on an erasure. The court admitted the declaration of the testator as to the person he had appointed executor, made before the execution of the codicil, and granted probate of the will and codicil to such executor. *Matter of goods of Sykes*. 521

9. The costs of an unsuccessful opposition to a will must be paid out of the estate in cases where the testator, by his own conduct, and habits, and mode of life, has given the opponents of the will reasonable ground for questioning his testamentary capacity.

10. In cases where neither the testator by his own conduct, nor the executors or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts entertained a *bond fide* belief in the existence of a state of things which, if it did exist, would justify the litigation, and the opposition is unsuccessful, each party

- must pay his own costs. *Davies v. Gregory.* 523
11. The testator having duly executed his will, subsequently, when suffering under an attack of delirium tremens, tore it in pieces. The pieces were preserved, and on his recovery he was informed of what he had done, and he answered he must have been mad when he did the act, and that he would make a fresh will, which intention he did not carry out:
Held, that the will was not revoked.
Brunt v. Brunt. 530
12. What is and what is not a valid revocation of a will and how the same to be shown. 532, *note*
13. How loss of will shown. 533, *note*
14. The testator, by birth a British subject, but domiciled in Spain at his death, executed a will in England, and subsequently several codicils valid by the law of Spain. Lastly, he executed a paper in England which confirmed the English will in whatever it did not clash or interfere with the contents of the codicil, which was to be considered as his last and deliberate will:
Held, that the Spanish codicils were not revoked by the last mentioned paper, but, as forming part of the will which did not clash with such paper, were confirmed by it. *In re goods of De La Saussaye.* 535
15. Testator executed a trust disposition and settlement, valid accordingly to the law of Scotland, and applicable to the whole heritable and movable estate which should belong to him at the time of his death. He subsequently executed a will, by which he disposed of all his real and personal estate, whether in Scotland or England. By the law of Scotland, the English will was ineffectual as a conveyance of the Scotch heritage, and did not revoke the previous settlement, and the two documents together form the complete testamentary disposition of the testator. The deceased's domicile was English, but he had a freehold estate in Scotland. The court granted probate of the will and trust disposition as together containing the will of the deceased. *In re goods of Donaldson.* 538
16. A testatrix made a specific disposition of certain property, including "all sum and sums of money which shall be due and owing to me at the time of my decease," and gave the residue of her personal estate to other persons. At the time of her death in 1781, she was one of the two next of kin of her son, who had died intestate in 1778. The son was the residuary legatee of his father, who had died in 1776. In 1800 a decree was made for taking the accounts of a partnership in which the father had been engaged, and which had been dissolved by the death of the other partner a few months before the father's death. In 1820 the representatives of the surviving executor of the father paid into court in this suit a sum of money on account of what was due from the executor to the father's estate in respect of moneys coming from the partnership. Nothing was shown as to the state of the partnership assets or of the estates of the father or son at the time of the death of the testatrix:
Held (affirming the decision of the master of the rolls), that the moiety of the testatrix in the fund in question did not pass under the gift of "sums of money due and owing to me at the time of my decease;" but under the residuary bequest, it not being shown that the assets were at her death in such a state that her share could be treated as a sum of money then owing to her. *Martin v. Ho'son.* 623
17. A testator gave certain personal estate to a college for founding a professorship of archæology, for the regulation of which professorship he purposed preparing a code of rules and regulations; and he directed that his executors should, as soon as they conveniently could after his death, communicate the bequest, together with a copy of the rules and regulations, to the college, and that within twelve months after the bequest had been so communicated to them, the college should signify their acceptance of the rules and regulations; and in case the college should decline to accept them, the bequest should be void, and the property should sink into his residuary estate.
The testator died without preparing any rules and regulations for the professorship:

Held (reversing the decision of Bacon, V.C.), first that the reference to the proposed rules could not be read as a description of the professorship intended to be founded, but merely as a condition attached to the bequest; and, secondly, that as the condition had become impossible by the act of the testator, the bequest took effect absolutely. *Fates v. University College.* 654

18. Testatrix, after devising real estate to a devisee, "and to her heirs and assigns," bequeathed to her trustees £500 upon trust to invest and pay the proceeds to E R for life, and in case (which happened) E R should leave no child living at her (E R's) decease, "then I direct my said trustees to divide the said sum of £500 . . . amongst the heirs of my late brother" J S:

Held, that by the word "heirs" were meant the next of kin of J S, according to the Statute of Distributions, together with the widow of J S, if living at testatrix's death. *Mut. ter of Stevens's Trust.* 746

19. Testatrix directed all her property at the death of A and B "to pass to my relatives in America."

Held, that the class was to be ascertained at the death of the testatrix; and that all her next of kin in America then living were entitled as joint tenants. *Eagle v. Le Breton.* 776

20. A testator gave all and every part of his real and personal property to his executors and trustees, to be disposed of by them according to the directions contained in his will. He directed his executors and trustees, as soon as possible after his death, to pay all his debts, funeral and testamentary expenses; he then gave all his personal estate to his brother absolutely, and he devised specifically various freehold estates, leaving other freehold estates undisposed of, which descended to his heir. The personal estate was insufficient for payment of his debts:

Held, that the specifically devised estates and the descended estates were liable ratably to the payment of debts. *Stead v. Hardaker.* 789

21. A testator devised all his real estate to the use of his son George, for life, with remainder to his first and other

sons successively, in tail male, and the testator appointed two persons, not including the tenant for life, to be protectors of the settlement under the 32d section of the Fines and Recoveries Act. There was no provision for filling up a vacancy in the office of protector. The tenant for life conveyed his life estate to his son the plaintiff, who was the first tenant in tail. One of the protectors died, and the survivor joined with the tenant in tail in a disentailing deed; the estate was then sold to a purchaser for an estate in fee simple:

Held, that the estate tail was effectually barred by the surviving protector having joined in the disentailing deed and a demurrer to a bill for specific performance of the contract for sale was overruled:

22. *Held*, also, that where a doubt arises from the validity of a title, the decision of the court removes the doubt, and specific performance will be enforced. *Bell v. Holby.* 792

23. Gift by a testator of all the residue of his estate and effects, real and personal, whatsoever and wheresoever, to his wife, E. C, and after her death to be equally divided to the children, should there be any; he also appointed his wife sole executrix. There were no children:

Held, that the wife was absolutely entitled. *Crozier v. Crozier.* 849

24. Bequest "unto each of my four nieces . . . the daughters of my deceased brother Joseph, the sum of £500." There were five daughters of Joseph, who all survived the testator:

Held, that the blank left in the will was not sufficient to distinguish this case so as to take it out of the settled rule, and that each of the five nieces was entitled to a legacy of £500. *McKechnie v. Vaughan.* 854

25. Residuary gift in trust for "my nephews and nieces living and the issue of any my nephews and nieces dead before me." Testator left brothers and sisters, but never had any nephews or nieces of his own.

Held, that his wife's nephews and nieces were entitled to the gift. *Sher-ratt v. Mountford.* 856

26. A testator gave certain property upon trust for his granddaughter A for

life, and after her death for her children, or some of them, as she should by deed or will appoint. A, by her will, appointed one-fifth of the fund to each of five children (all of whom were living at the death of the original testator) for life, and after the death of each child, directed that the share in which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment, in favor of the children of the said five children and of the survivors in different events:

Held, a good exercise of the power of appointment given by the will of the testator. *Stark v. Dakyns*. 857

27. Testator gave the residue (which amounted in value to about £8500) of his personal estate upon trust to permit a married woman to receive the income during her life, with remainder after her death for the benefit of her children, and if no children, for the husband absolutely. In the event of the death of the wife in the lifetime of her aunt N, testator directed the then legally secured income of the aunt, if below £250 a year, should be made up to that amount.

From the death of the testator, in April, 1861, down to February, 1865, an annuity of £300 was regularly paid to N, by arrangement, out of the husband's banking account; but the wife having eloped in September, 1864, the payment was, after the above date, discontinued.

In 1869, the bill was filed by N against the husband and wife, alleging by amendment, after the answer of the wife (who supported the plaintiff's case) had come in, that the husband and wife both promised the testator, at his request, on his death-bed, to make an allowance of £300 a year to the plaintiff, and praying for a declaration that the income of the testator's residuary real and personal estate was and is subject to a trust "for the payment of £300 a year to the plaintiff during the wife's life, if the plaintiff should so long live; and for payment of the arrears of the annuity by the husband.

The husband denied having made any such promise; but it having been found as a result of the evidence that a promise, as alleged, was made to the testator by the wife, and was assented to by the husband:

Held, that the income of the testa-

tator's estate was subject to the alleged trust; and an account and payment ordered accordingly.

28. No costs allowed to the plaintiff, who was merely a nominal suitor; the suit being, in substance, that of the wife. *Norris v. Frazer*. 864

29. Testator, after giving legacies to various persons, describing their relationship, including a person described as his niece, but in reality illegitimate, and persons connected by affinity, directed that if the whole of his property made more than the whole amounts mentioned in his will, it should be divided "amongst my relations in proportion to their separate amounts."

Held, that only such of the legatees as were blood relations were entitled under the residuary gift. *Hibbert v. Hibbert*. 884

30. A testator gave to A. B a legacy to be vested in him when and as he should attain the age of twenty-one years, or if he should die under that age, leaving lawful issue at his death; and in case he should die without attaining a vested interest in his said legacy, the testator gave the legacy over to other persons. The legatee attained the age of twenty-one, and died in the testator's lifetime, leaving issue:

Held, that the gift over took effect. *Gaitskell's Trust*. 895

31. A testatrix advanced £900 to M on an assignment by him of a covenant by F to transfer to M £1,000 stock, and to pay interest at £5 per cent. By her will she gave F £3,000 and all sums due to her by him, and directed her executors not to require payment of the £900 due from M, but out of the £3,000 given to F to retain enough to purchase £1,000 stock, in satisfaction of the covenant by F and to pay the surplus thereof beyond the £900 and interest to M. F having predeceased her, she, by a codicil, directed the £3,000 to form part of her residuary estate, but directed her executors not to call on F's representatives for payment or transfer of the £1,000 stock, nor to enforce payment by M of the £900:

Held, that M was not at liberty to enforce against F's estate the covenant to transfer the £1,000 stock. *Synge v. Synge*. 897

See DOMICIL, 673.

MARRIED WOMAN, 137.

WORDS.

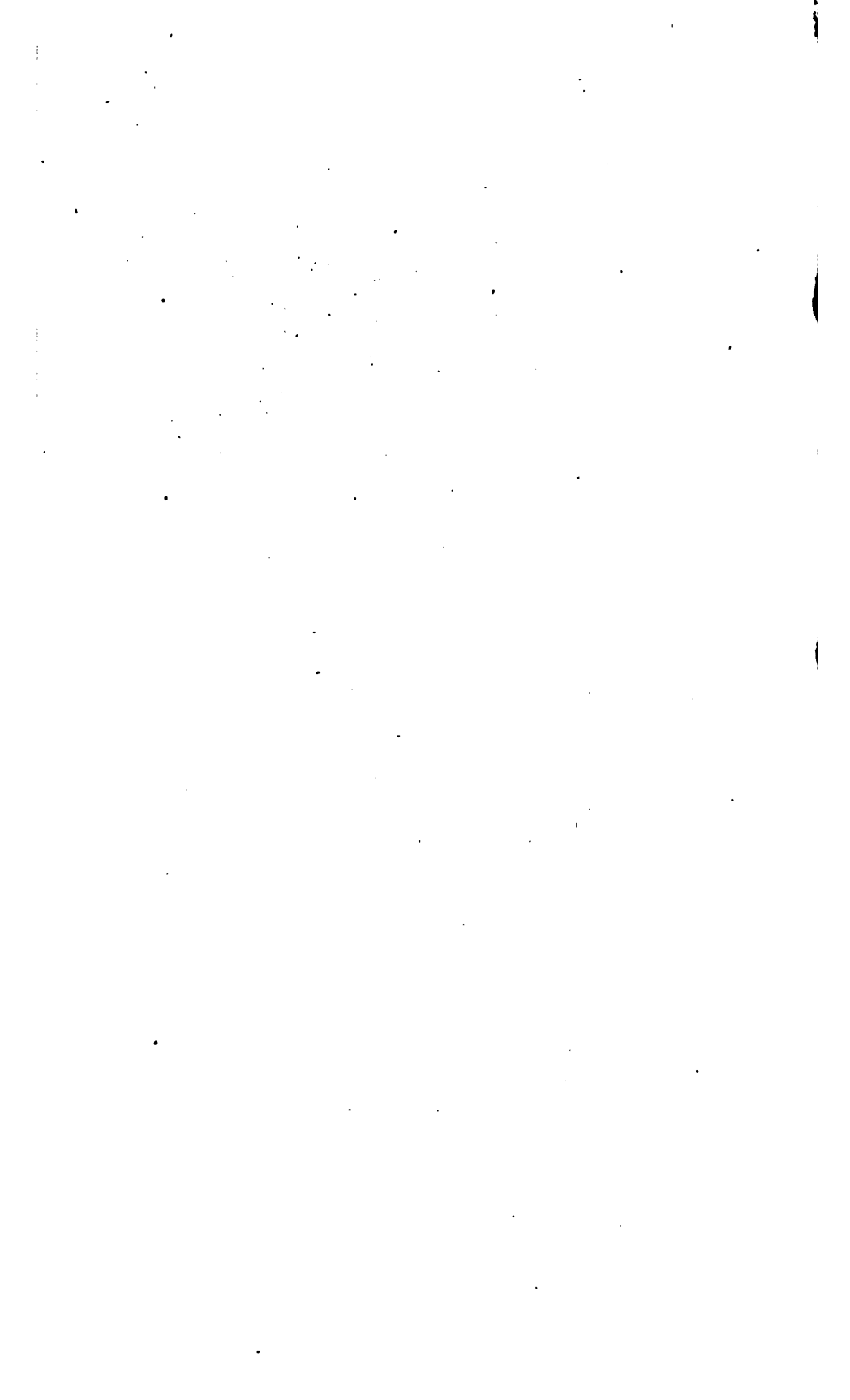
"All and every other the issue of my body,"	352
"Annual value,"	381
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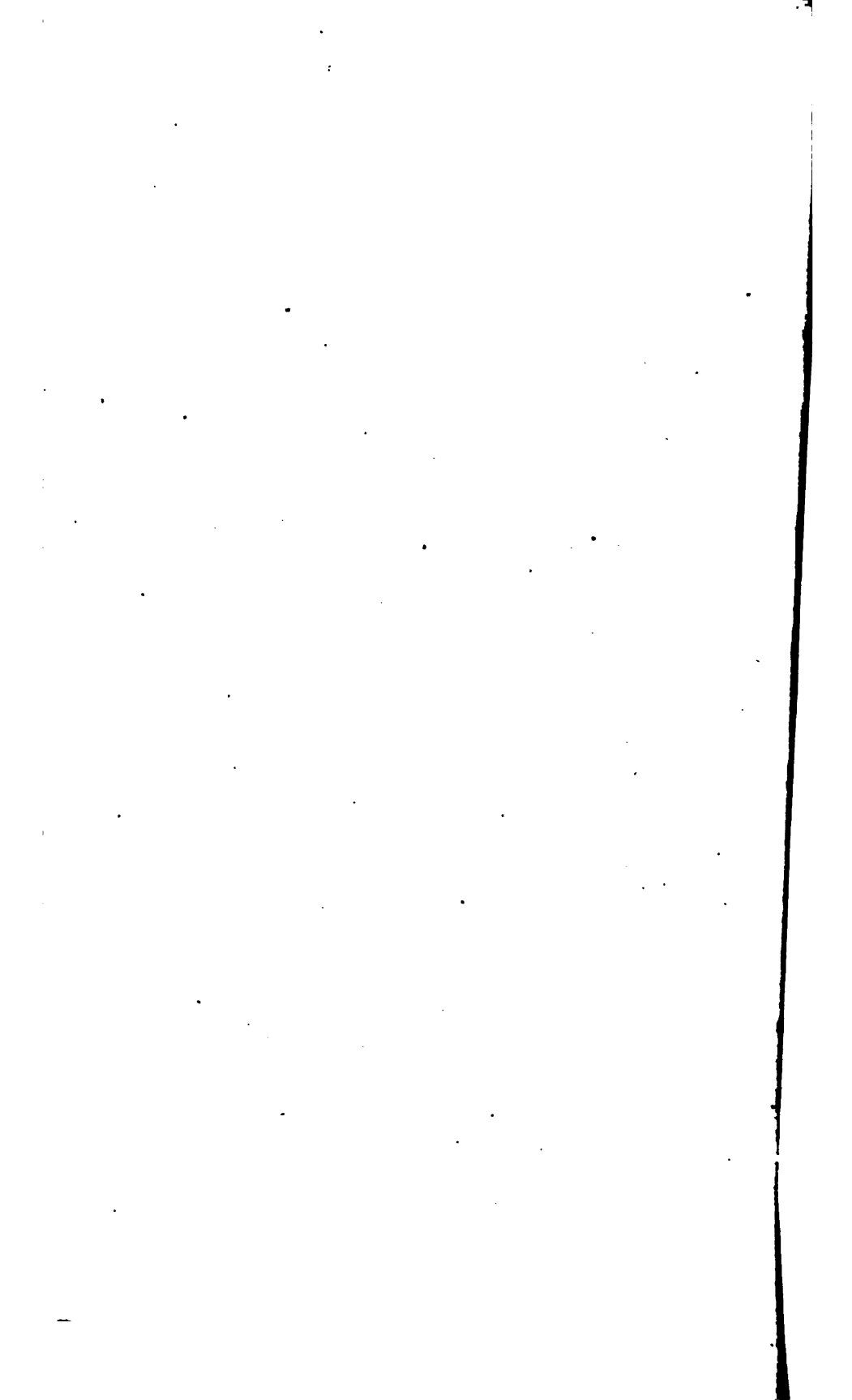
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See DAMAGES, 707.

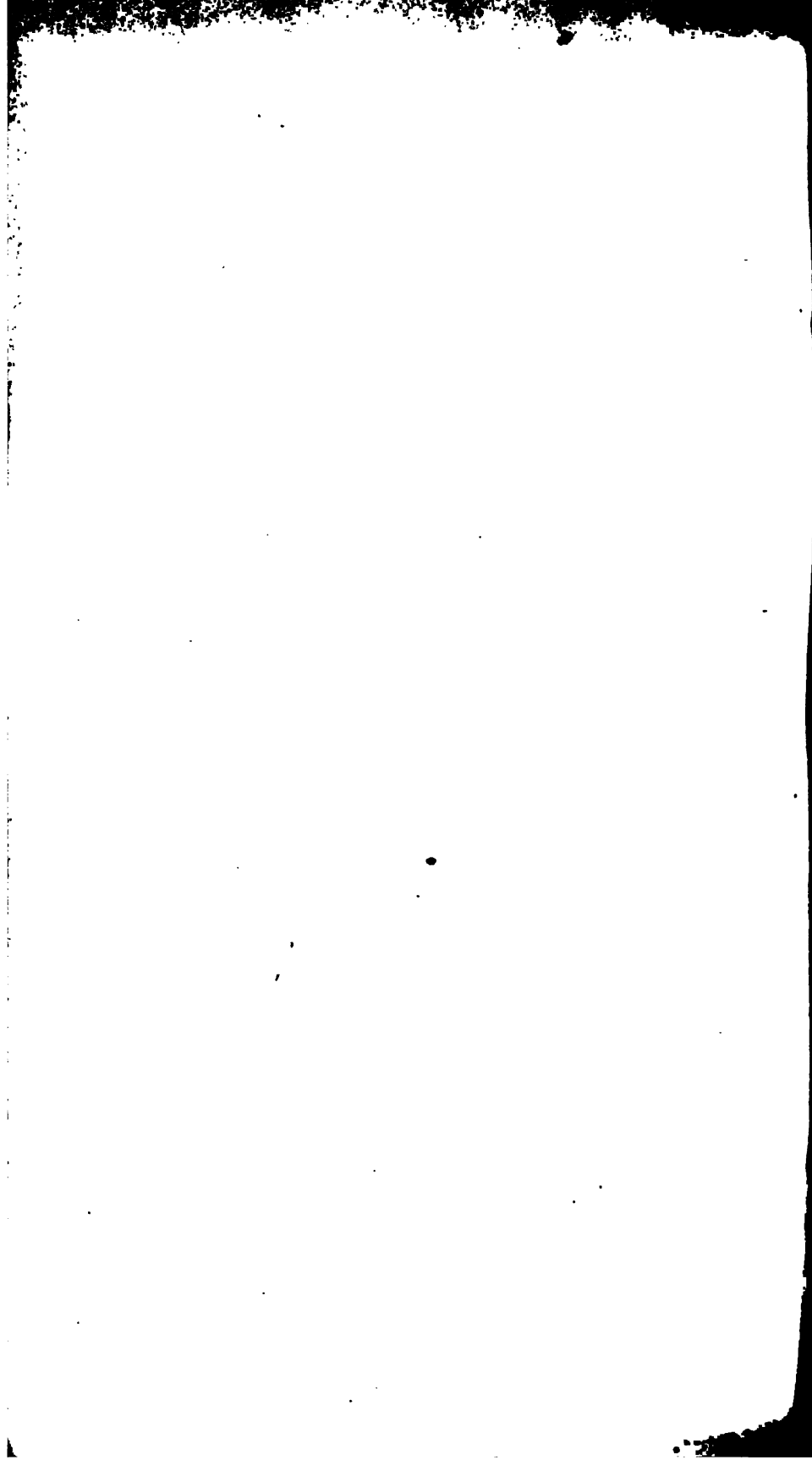












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